76-6786

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Case No. 77-A-783

ALBERTA L. OSBORNE,

Petitioner,

- v -

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner, Alberta L. Osborne, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio, affirming the decision of the Tenth District Court of Appeals of Franklin County, Ohio, upholding the Franklin County Court of Common Pleas conviction for aggravated murder and kidnapping. The Supreme Court of Ohio upheld the intermediate appellate court decision and affirmed the lower court's judgment and rulings in State v. Osborne, 49 Ohio St. 2d 135, 359 N.E.2d 78 (1976). The judgment of the trial court and the decision of the Tenth District Court of Appeals of Franklin County, Ohio, are unreported.

JURISDICTION

The judgment and decision of the Supreme Court of Ohio was entered on January 10, 1977. Jurisdiction of the court is invoked under 28 U.S.C. §12-57-3, petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the imposition and carrying out of petitioner's death sentence violate the Eighth and Fourteenth Amendments to the Constitution of the United States?

2. Was the petitioner denied a fair trial and due process of law due to the inadequacy of the record of the trial below?

3. Did the charge to the jury violate the petitioner's Fifth and Fourteenth Amendment rights to due process of law?

4. Did the totality of the circumstances surrounding the selection of, and presentation of evidence to, the jury violate petitioner's Sixth and Fourteenth Amendment rights to trial by a fair and impartial jury?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

Ohio Constitution, Article I, §10

Ohio Revised Code

§2903.01

§2929.03

§2929.04

STATEMENT OF FACTS

On the fifteenth day of December, 1974, Hermalee Ross was abducted from the parking lot of an Ontario grocery store located on Morse Road in Franklin County, Ohio, and taken to Delaware County, Ohio. In Delaware, Hermalee Ross was taken to an abandoned schoolhouse, struck repeatedly with a blunt instrument and shot in the back of the head.

Eyewitnesses, both at the grocery store lot and in the vicinity of the abandoned schoolhouse, were instrumental in leading to the arrest, and subsequent conviction, of Carl Edward Osborne, Jr., petitioner's son, and James Kenneth Weind, his friend.

The police investigation uncovered a clandestine affair that had lasted between petitioner and the victim's husband, Edgel Ross, for approximately five years preceeding December of 1974. As a result of this investigation, on December 30, 1974, petitioner was indicted by the Franklin County Grand Jury for planning the abduction/murder with her son and his friend, and for paying them a sum of money for carrying out the plan.

To maintain its theory of the case, the State of Ohio produced thirty-five (35) witnesses who testified over a period of two and one-half weeks of trial. Although the State's case against petitioner was largely circumstantial, on March 18, 1975, the jury returned verdicts of guilty to kidnapping and two counts of aggravated murder with the specification that the act was committed for hire.

Michael Goins, who was under indictment for another crime, assisted police in the recovery of the murder weapon. Goins testified that, in the early morning hours of December 15, 1974, Weind and Carl Osborne came to his apartment to procure a weapon. Later that day Weind returned to Goins' apartment, informed Goins that the "borrowed weapon" had broken and been thrown away, and solicited Goins' help in disposing of the murder weapon, a Titan, .25

caliber automatic pistol. Subsequent testimony showed that the murder weapon had belonged to the petitioner.

Kay Osborne, daughter of petitioner, testified that on returning home early on the morning of December 15th, petitioner, Weind and Carl were sitting in the living room of petitioner's home talking and that the two men had borrowed her car to go to breakfast. The car was returned, but petitioner told Kay that Weind had become ill in the car and proceeded to scrub out the interior of the automobile with the help of Weind and her son. A police chemist testified that several blood stains were found in the rear of Kay's car.

The most incriminating evidence against petitioner was Kay's testimony that her mother told her of hiring her son Carl and his friend Jimmy Weind to kill Mrs. Ross because she was losing the companionship of Edgel Ross. On cross examination, however, Kay admitted that petitioner had told her several "versions" of the event, and that her mother could, in fact, have been speculating in an effort to help her son, Carl Osborne, Jr., who was then under indictment for his role in the murder.

On December 30, 1974, the Franklin County Grand Jury returned a three count indictment against petitioner. Count One charged petitioner with violation of Ohio Revised Code §2905.01 - Kidnapping. Count Two charged petitioner with violation of Ohio Revised Code §2903.01 - Aggravated Murder, with two specifications. Count Three charged petitioner with violation of Ohio Revised Code §2903.01 - Aggravated Murder, with two specifications. The specifications involved in both Count Two and Count Three of the indictment were: (1) felony murder; (2) murder for hire.

The trial began on March 3, 1975, and on March 18, 1975, the jury convicted petitioner of all three charges including Specification Number Two to Counts Two and Three of the indictment.

On June 2, 1975, the petitioner was sentenced to death by electrocution; said sentence is stayed pending appeal.

The petitioner moved the court for a change of venue arguing that this homicide, and the circumstances surrounding the family involvement, had occasioned a tremendous amount of news media coverage. The trial court denied such motion and the matter proceeded to trial and verdict.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE APPLICATION OF THE DEATH PENALTY UNDER OHIO STATUTES DENIES EQUAL PROTECTION OF LAW.

Ohio's capital punishment scheme holds that death is mandatory if certain conditions are found to occur. First, the criminal defendant must be charged with and found guilty of aggravated murder in violation of Ohio Revised Code §2903.01 (Page, 1975)[1]. Second, the criminal defendant must be charged with and found guilty of one or more of seven aggravating circumstances found in Ohio Revised Code §2929.04 (A)[2].

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1 / Ohio Revised Code §2903.01

"Aggravated murder is defined as follows:
a) No person shall purposely, and with prior calculation and design, cause the death of another.
b) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."

2 / Ohio Revised Code §2929.04

"A) The aggravating circumstances are:

(1) that the offense was the assassination of a specified office-holder or candidate for office;
(2) that the offense was committed for hire;
(3) that the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender;
(4) that the offense was committed while the offender was a prisoner in a detention facility;
(5) that the offender has previously been convicted of an earlier offense the gist of which was the purposeful killing or attempted killing of another, or that the offense involved the purposeful killing of or attempt to kill two or more persons;
(6) that the victim was known by the offender to be a law enforcement officer, and either (a) the victim was engaged in his duties at the time of the offense or (b) it was the offender's specific purpose to kill a law enforcement officer; and
(7) that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary."

Once the criminal defendant has been found guilty of aggravated murder with specifications, the guilt determination phase terminates and the jury is discharged. [Ohio Revised Code §2929.03 (C)]. The criminal defendant then enters the sentencing phase which is performed only by the court without input from the jury. A pre-sentence investigation and psychiatric examination of the defendant are required and the court must hear testimony and other evidence if the same exists. [Ohio Revised Code §2929.03 (D)[3/]]. The court then requires the defendant to prove one of the three mitigating circumstances found in Ohio Revised Code §2929.04 (B)[4/]. The

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3 / Ohio Revised Code §2929.03 (C) and (D)

"(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation."

4 / Ohio Revised Code §2929.04 (B)

"The mitigating factors are:

(1) that the victim of the offense induced or facilitated it;
(2) that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; and
(3) that the offense was primarily the product of the offender's psychosis or mental deficiency although such condition is insufficient to establish the defense of insanity."

death penalty is mandatory if, at the mitigation hearing, the defendant fails to prove, by a preponderance of the evidence, that any of the mitigation circumstances exist. If one or more of the mitigation factors are proven, the defendant must receive a life sentence.

In Gregg v. Georgia, 96 S. Ct. 2929 (1976), this Court held that the concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972), surrounding the arbitrary or capricious imposition of the death penalty, could be satisfied by the careful drafting of statutes that insure that the constitutional rights of criminal defendants charged with capital offenses would be protected and that the actual application to a particular defendant would be in accordance with the mandates of the statutory scheme. This Court upheld the Georgia statutory scheme in Gregg, supra. Petitioner submits an examination of the Ohio statutes shows that the Ohio statutory scheme does not come within the holding of Gregg, supra.

Before examining Ohio's capital sentencing statutes and testing them under Gregg, supra, the Georgia statutory scheme must be understood. The Georgia statutes, as amended after Furman, supra, retained the death penalty for specific categories of crime, including murder. The defendant's innocence or guilt is determined by a Judge or a jury in the first stage of a bifurcated trial. Upon completion of the guilt determining stage ending in a finding of guilty, or a plea of guilty to a capital crime, a hearing is conducted before the guilt determining body. In Georgia, the sentencing procedures are essentially the same in both bench and jury trials.

During the sentencing stage, a criminal defendant is given wide latitude in introducing evidence. Before a criminal defendant may be sentenced to death, one of ten aggravating circumstances specified under Georgia statutes must be found.

Under Georgia statutes, the criminal defendant has two avenues of appeal. First, he may follow the conventional Appellate process available in all criminal cases, or he may seek direct

review in the Supreme Court of Georgia on the appropriateness of the death sentence in his individual case. Under the Georgia statutes, the Supreme Court must consider:

> . . . the punishment as well as any errors enumerated by way of appeal, . . . [to determine] (1) whether the sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor, and . . . (2) whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . . and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
> GA. Code Ann §27-2537 (Supp. 1975)

If the Supreme Court of Georgia finds the death sentence was properly given, it is required, in the decision or opinion it issues, to specify similar cases it has taken into consideration in affirming the defendant's guilt.

The system in Ohio varies substantially from the system set forth in the Georgia statutes and it is these variances which petitioner submits are fatal to the Ohio statutes.

Under Ohio's present statutory scheme, a criminal defendant in a capital case is awarded a bifurcated trial. It is at this point that the similarity between Ohio and Georgia statutes ends. Under Ohio law, the jury only determines the guilt or innocence of the criminal defendant, a single judge determines the sentence of the offender. The sentencing procedure under the Ohio statutes provides:

> . . . if the indictment contains one or more specifications listed in such code sections, then, following a verdict of guilty, while both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined: (1) by a panel of three judges which tried the offender upon his waiver of his right to trial by jury; (2) by the trial judge, if the offender was tried by jury. 27 O. Jur. 2d, §203.3 (Supp. 1976)

This procedure is set forth in Ohio Revised Code §2929.03 (C) and provides for a great disparity between criminal defendants. If a criminal defendant elects to have a trial by jury, his sentence is considered by only one judge; if that defendant waives the right

to a jury trial, the sentence, and possible imposition of the death penalty, is determined by a three judge panel. Common sense dictates that the three judges, in making the sentencing determination will be forced to discuss and analyze all factors surrounding the crime and the criminal defendant before determining the sentence. Where only one judge is involved in the sentencing procedure, there can be no inter-play of ideas concerning the mitigating facts and circumstances surrounding the criminal defendant.

Under Ohio statutes, the Court is required to make a pre-sentence investigation and psychiatric examination before death may be imposed and then conduct a hearing wherein testimony and evidence is taken in an attempt to determine if any mitigating circumstances exist. The Ohio statutes do not permit the wide latitude of the Georgia statutes and the mitigating circumstances which must be found in Ohio are couched in ambiguous terms.

Under the statutes of Ohio, regardless of the aggravating circumstances found to exist, the death penalty can be avoided when taking into consideration the nature and circumstances of the offense charged and the history and character of the criminal defendant. One or more of the following must be found in order to avoid the death penalty:

(1) The victim of the offense induced or facilitated it;

(2) it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation;

(3) the offense was primarily the product of the offender's psychosis or mental deficiency, that such condition is insufficient to establish the defendant's insanity. Ohio Revised Code, §2929.04 (B)

The statutes of Ohio provide no guide as to the meaning of these mitigating circumstances. Specifically, the petitioner would refer the Court to mitigating circumstance number three. What standard is there in the Ohio Revised Code for establishing that a defendant has a mental deficiency, and what mental deficiency is insufficient to establish a defense of insanity but

sufficient to establish mitigating circumstances so as to avoid the death penalty? There are no guidelines under Ohio law which a judge may follow in making this determination. These circumstances are, at best, vague and allow for unrealistic discretion by each individual trial judge.

In Gregg, supra, the Supreme Court said "because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Under the Ohio statutes, however, there is a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner as the mitigating circumstances set forth under the Ohio Revised Code are open to a wide range of interpretation and allow for unfettered discretion between judges. For example, a criminal defendant before one judge, who lacked education and training and suffered from economic and environmental deficiencies could be found to be in such a state of mind as to suffer from "diminished capacity" and, thereby, avoid the death penalty. The same criminal defendant, in front of another judge, could be found not to suffer such "diminished capacity" and be sentenced to death!

Under the Ohio statutes there is no mandatory requirement that death penalty cases be compared. The facts of one case are not compared with other death penalty cases to see if the penalty is warranted. The criminal defendant who has been sentenced to death, in Ohio, must undergo the agony of several years of incarceration in the strictest of confinement, before his or her sentence of death is reviewed by the Supreme Court. In addition, there are no mandatory guidelines for the Supreme Court of Ohio to follow when reviewing a capital case. Furthermore, the circumstances surrounding the imposition of the death penalty for an individual criminal defendant are not required to be compared with other similar crimes and other similar defendants. Thus, disparity can creep into the system and injustice can be worked on the individual defendant.

The Supreme Court in Gregg, supra, recognized that, just because the Georgia statute as applied to the defendant passed the constitutional muster of Furman, supra, not all statutory systems would satisfy the concerns of Furman, supra, and that each state's statutory system must be judged on an individual basis. When Ohio statutes are viewed in comparison with Georgia statutes and in conjunction with the opportunities in Ohio for prosecutorial discretion, executive clemency, jury discretion and the ambiguous terms contained in the guidelines for mitigating circumstances, it is clear that the death penalty in Ohio is imposed outside the guidelines set down in Furman, supra, and explained in Gregg, supra.

How then does the Ohio scheme fail constitutionally?

Examination of the Ohio death penalty statutes and the history of their enactment established that they, like the statutes invalidated in Woodson v. North Carolina, 96 S. Ct. 2978 (1976) and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), are more rigid than contemporary standards of decency can condone and are reflective, not of the will of the people of the State of Ohio as expressed through its legislature, but of a compromise between humane policy concerns and the supposed requirements of Furman, supra.

In the wake of Furman, supra, twenty-one (21) of the thirty-five (35) states that enacted new death sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of certain criminal conduct[5/]. These states responded to the judgment of respected legal scholars that only the removal of all sentencing discretion would satisfy the Furman requirement

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5/ 11 Del. Code §§636, 4209(1); Idaho Code §§18-4003 and 4004; Ind. Ann. Stat. §10-3041(b); Ky. Crim. Code, Sec. 5. 76(2) and 61(2); La. Rev. Stat. Ann. §§14:30, 14:113 and 14:44; Md. Code Ann. Art. 27, §413; Miss. Code §§97-3-65, 97-3-21 and 97-3-19(2); Vernon's Mo. Stat. Ann. §§559.009(3) and 559.05; Nev. Rev. Stat. §200-030(5); N.H. Rev. Stat. Ann. §630:1; N.M. Stat. Ann. §40A-2-1, 40A-20-2; N.C. Gen. Stat. §§14-17 and 14-21; Okla. Stat. Tit. 21, §701.3; R.I. Gen. Laws Ann. §11-23-2; S.C. Code §16-52; Tenn. Code Ann. §§39-3702 and 39-2402; Va. Code §18.2-31; Wash. Rev. Code 9.48.030, Initiative Measure No. 316.

that death sentences not be arbitrarily imposed. The federal government and eleven (11) states enacted statutes following the example of the Model Penal Code Proposed Draft of 1962 in that they directed consideration of aggravating and mitigating circumstances in the process of determining the sentence in a capital case[6]. These twelve jurisdictions, finding the mandatory scheme too harsh and anticipating that the United States Supreme Court would approve capital sentencing discretion if that discretion were guided by standards, chose to focus sentencing deliberations upon a broad range of mitigating factors. In Arizona, Georgia, Illinois[7], Montana, and Utah, any factor deemed mitigating by the sentencing authority may be considered, and may preclude imposition of a capital sentence[8]. And, while a summary of mitigating circumstances often includes factors like those specified by §2929.03 (B) (1) and (2) -- factors that touch only upon the circumstances of the offense itself and suggest that the crime was of a less aggravated nature, despite the fact that it fell within the definition of capitally punishable offenses -- the mitigating factors considered in the sentencing process in these twelve jurisdictions invariably include factors having to do with "the character and record" of the defendant whose life is at stake. Thus, in Alabama, Arkanses, Colorado, Connecticut, Florida, Nebraska, Utah, and in Federal jurisdictions, the age of the defendant must be considered, and in Colorado and Connecticut and under Federal law a finding that the defendant was under eighteen is an absolute bar to

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6 / See Model Penal Code §201.6 (Proposed Official Draft, 1962).

7 / The Illinois statute has been invalidated on grounds not relevant to this discussion.

8 / Ariz. Rev. Stat. §13-454(D); Ga. Code §27-2531.1(b); Ill. Rev. Stat. ch. 38, §1005-8-1A; Mont. Rev. Codes Ann. §94-5-105 (1); Utah Code Ann. §76-5-202(1) (g).

imposition of a death sentence[9]. In all twelve jurisdictions, the prior criminal record of the defendant must be considered[10]. In Alabama, Arkansas, Florida and Nebraska, a broad range of mental and emotional disturbance may be considered in mitigation. Limitations in the capacity of the defendant to regulate or appreciate the wrongfulness of his conduct are mitigating factors in Alabama, Arizona, Arkansas, Connecticut, Florida, Nebraska and in Federal jurisdictions and preclude imposition of a death sentence in Colorado.

The essence of this Court's decisions in Woodson, supra and Roberts, supra, is that the death penalty cannot be imposed unless it is appropriate or just, as determined by contemporary standards of decency. Accordingly, the sentencing agency must consider, with particularity, the offender's character and record in order to be able to distinguish the offender who deserves to die

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9 / Ala. H.B. 212 §7(g); Ark. Code §41-4712(d); Sec. (5) (a), Col. S. B. No. 46 (1974 sess.); Conn. Gen. Stat. §53a-45(4) (f); Fla. Stat. Ann. §921.141(7); Neb. Rev. Stat. §29-2523(2); Utah Code Ann §76-3-207(1) (e); 49 U.S.C. 1473(c) (6) (A). See also Cal. Penal Code §190.3; N.M. Stat. Ann. §40a-20-2; NY Penal Law §125.27.

10 / Ala. H.B. 212 §§(6) (a) and (b); Ariz. Rev. Stat. §§13-454 (1) and (2); Ark. §§41-4711 (a) and (b); Sec. 4 (6) (a). Col. S.B. No. 46; Conn. Gen. Stat. §§53A-45(4) (g) (1) and (2); Fla. Stat. Ann. §§921.141 (6) (a) and (b) and (7) (a); Ga. Code §27-2543.1(b) (1); Ill. Rev. Stat. ch. 38, 1005-8-1A(3); Mont. Rev. Codes Ann. §94-50105(1) (b); Neb. Rev. Stat. §§29-2523(1) (a) and (2) (a); Utah Code Ann. §76-5-201(1) (a) and (g) and §76-3-207 (1) (a); 49 U.S.C. §1473(c) (7) (B) (i) and (ii).

While it is true that certain kinds of prior criminal conduct may make a defendant eligible for a death sentence under §2929.04 (A) (4) and (5), the prior record of an offender convicted pursuant to the other five capital circumstances receives no consideration, and it is impossible in any case to weigh prior record against other personal mitigating circumstances. Moreover, the United States Supreme Court has indicated that only where a defendant has become eligible for a death sentence because he committed a murder while serving a life sentence is it possible that the very definition of the crime will indicate enough about "the character and record" of the accused to warrant a death sentence. The Court noted that "even this narrow category does not permit the jury to consider possible mitigating factors." For this reason it declined to reserve the question of the validity of a mandatory death penalty for "a person previously convicted of an unrelated murder" and justified the reservation regarding killings by life term inmates on the basis of the "unique problem" presented by such inmates. Roberts v. Louisiana, supra, 44 U.S.L.W. at 6283, n.9.

from the offender who does not. Petitioner submits that Ohio's statutes do not permit such particularized consideration in that the mitigating factors recognized by Ohio law are either illusory or too narrow, and that Ohio judges are therefore unable to administer the system with fidelity to appropriateness or justness of punishment.

The decision in State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), supports this argument. In Bayless, the court recognized that some "mental disorders" are outside the scope of the statutory phraseology [at 87], and it construed "mental deficiency" to be limited to low intelligence or retardation [at 95-6]. This traditionally narrow definition means that "mental deficiency" is a "mental disease or defect" as those words are used in the defense of insanity.

Perhaps recognizing that the Bayless definition supported our arguments, the court immediately changed its mind. In State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976), the Ohio Supreme Court stated that the statutory language was intended to allow the sentencer "the broadest possible latitude in the examination of the defendant's mental state of mental capacity," and that "any mental state or incapacity may be considered" short of the defense of insanity [at 268]. Indeed, the court even refused to define "psychosis or mental deficiency" on the ground that "to define terms such as those used in the statute is to narrow them" [at 268]. The expansive definition seems inconsistent with the facts of Bayless. Bayless was dull normal, emotionally and culturally deprived, and subnormal in conscience [at 94]. Nevertheless, having articulated a broad definition in Black, the court did not proceed to reconsider Bayless and apply the broad definition to its facts. Rather, it ignored Bayless altogether, not even trying to explain away the apparent contradiction between the two cases. It would thus seem that the court's broad definition in Black is only cosmetic. This observation is supported by the review of the cases decided since Black which involve the issue of mitigating psychosis

or mental deficiency.

In State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976), the court purported to continue the broad interpretation of psychosis or mental deficiency by holding not only that the defendant's age could be considered in determining whether he had a mitigating mental deficiency, but also that age was a "primary factor" in that determination [at 282]. It is, of course, true that old age may cause brain deterioration and that a senile person may be mentally deficient. But it is hardly likely that such a person would even be charged with aggravated murder, let alone be convicted of it. In terms of the real world, it is youth, rather than old age, that will be involved in a capital case. The court did say that youth, too, was relevant to the determination of mitigating mental deficiency, but the court unfortunately did not explain how, and no obvious explanation suggests itself. Moreover, it should be noted that youth was actually involved in Bell. The defendant was sixteen (16), had lacked family or other adequate supervision, was apparently using drugs, and was unable to cope with the demands of the educational system. Yet the court upheld the death sentence in Bell, thus further evidencing the cosmetic nature of the Black definition.

Similarly, in State v. Harris, 48 Ohio St.2d 351, 2 Ohio App3d 472 (1976), the court upheld a death sentence imposed on a juvenile sociopath, and in State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976), it affirmed a death sentence imposed on a defendant who was below average intelligence and was educationally deficient.

The expansive definition of mitigating mental deficienty in Black could hardly have been anticipated by Ohio's trial judges. Thus it is quite likely that they used a narrower definition in resolving the issue. Despite this, the Ohio Supreme Court has not remanded any case for a new sentencing hearing to be conducted in accordance with Black's definition. In each, the court has

simply reviewed the record as made, and has held in every case in which the issue was raised that, expansive definition to the contrary notwithstanding, the defendant did not prove a mitigating mental deficiency. In terms of holdings, rather than definitions, mitigating mental deficiency is as narrow as it was said to be in Bayless, supra. In terms of holdings, rather than definitions, Ohio trial judges now know that Black, supra, should not be taken at face value. The inevitable result will be that trial judges will not make the appropriate or just distinctions among defendants required by Woodson and Roberts.

Further examples of the constitutional failings of Ohio's capital punishment statutes are best illustrated by two examples.

First, since the decision in Bayless, supra, some twenty cases where the death penalty was involved have been reviewed by the Ohio Supreme Court. Only one reversal has resulted and that case was on a procedural question. State v. Lockett, 49 Ohio St.2d 71, 358 N.E.2d 1077 (1976). Lockett,is interesting in that the activities subsequent to his reversal show the broad range of discretion available in Ohio cases[10A /].

10A / The following excerpt of proceedings clearly illustrates the judicial discretion available in Ohio.

"IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO, CRIMINAL DIVISION

State of Ohio, :

Plaintiff, :

vs. : Case No. 76CR-12-3104

Dennis C. Burke, :

Defendant. :

- - -

EXCERPTS OF PROCEEDINGS

- - -

Taken before the Honorable Fred J. Shoemaker, Judge, Court of Common Pleas of Franklin County, Ohio, under date of February 15, 1977.

- - -

Second, petitioner, like all other persons convicted of

10A / (continued)

APPEARANCES:

Mr. Gerald Todaro, Assistant Prosecuting Attorney,

On behalf of the Plaintiff, State of Ohio

Mr. Gary M. Schweickart and Mrs. Thomas Vivyan,

On behalf of the Defendant, Dennis C. Burke.

- - -

Tuesday Afternoon Session,

February 15, 1977.

- - -

* * * * *

- - -

WILLIAM LAZAROW

Called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

MR. SCHWEICKART: If I may, Your Honor, I think to help focus things, and I'm sure for the Prosecutor, because he doesn't know why I called Mr. Lazarow, to give just a brief statement as to -- in the way of an opening statement, with respect to Mr. Lazarow's testimony of this motion, if I may.

THE COURT: Why don't you just ask him. I think we'll figure it out.

MR. SCHWEICKART: Okay, very good.

- - -

DIRECT EXAMINATION

By Mr. Schweickart:

Q. State your name, please?

A. William Lazarow.

Q. And what is your occupation, sir?

A. I am an attorney. My office is located at 16 East Broad Street, Columbus, Ohio.

Q. Mr. Lazarow, very recently have you had an opportunity to be representing anyone charged with a capital offense?

A. Yes, I was appointed, recently, to represent Mr. James Lockett in Summit County, the case of State of Ohio versus James Lockett.

a capital offense in Ohio, did not have the individual appropriatene

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10A / (continued)

Q. Now, with respect to your representation of Mr. Lockett -- this is a capital case in the State of Ohio?

A. That is correct.

Q. Okay. Now, were there any Codefendants on that case?

A. Maybe I should give just a little background.

Q. Please do.

A. Mr. James Lockett was one of four individuals charged in a felony murder case which arose in January of 1975 in Akron, Ohio.

THE COURT: Isn't that the case that just came out in the O. Bar?

THE WITNESS: That's correct.

THE COURT: And I think the day after it came out I was talking to you or the day -- I remember you were --

MR. SCHWEICKART: Your were talking to me, I believe.

THE COURT: Was it you?

THE WITNESS: I don't think I had any conversation with you.

THE COURT: I know about the case; it's a reported case.

THE WITNESS: There were two cases reported the same day. James' case was reversed. He had been convicted and given -- sentenced to the death penalty. His sister, Sandra's case was affirmed on the same day. She also had been sentenced to death.

Q. (By Mr. Schweickart) Okay. Now, has the case of James Lockett been remanded for new trial?

A. Yes, it has.

Q. Now, recently, and using recently, let's take you back to the events of yesterday, being February 14, 1977, did you have the occasion to engage in any plea bargaining with representatives of the Prosecution for the State of Ohio on this case?

A. Yes, I did. We did have a hearing yesterday morning in Akron. At that time I met Mr. Kirkwood of the Prosecutor's Office in Summit County who informed me that he was the chief trial counsel there. We did have some discussions on possibly resolving the case short of trial; and he did come up with a proposal.

Q. Can you tell the Court what the proposal was?

MR. TODARO: Judge --

of her conviction evaluated by the Supreme Court of Ohio. There is

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10A / (continued)

THE COURT: I don't see how it's relevant.

MR. SCHWEICKART: Your Honor, that's what I say, if I had an opportunity to --

THE COURT: Take, proffer the answer. I don't see how it's relevant, but answer it for the record.

MR. TODARO: Note by objection.

THE WITNESS: It was suggested that we plead Mr. James Lockett, whose case was remanded, guilty to aggravated murder, that the death specifications would be dropped; and that the Prosecutor's Office would have a request in Sandra's case, it be brought back to the Court through a post-conviction action, have her conviction not reversed, but vacate her conviction and have her also plead guilty to aggravated murder without the specifications, thereby taking her off of death row where she now is.

So, in effect, they offered to have Mr. Lockett plead guilty to murder without specifications; then his sister, whose case had been affirmed by the Ohio Supreme Court, would thus be taken off of death row and have the death penalty removed from her head.

Q. (By Mr. Schweickart) In other words, to use the prosecutorial discretion representing the State of Ohio, the Summit County people, in essence, offered not to kill James Lockett's sister if he would plead guilty to aggravated murder, is that correct?

A. That was my understanding.

Q. And to your knowledge, was any of this negotiation subject to judicial approval?

A. Mr. Kirkwood indicated that, when I asked him, inquired into the method by which this would be done, the method by which Sandra's plea would be vacated or Sandra's conviction, he indicated that he had had no trouble with this in the past, that there were different methods by which this could be done.

We did have a brief conversation with the Judge on this case, Judge Barbuto, and he indicated in this case that anything we agreed along this line he would go along with 99 percent of the time.

Q. In other words then, or if I'm correct, Mr. Lazarow, that the State was discussing sparing an individual who had been convicted in the State Court process, was sentenced to death in the State Court process, and had the sentence of death affirmed by the highest court in the State of Ohio, through the vehicle of prosecutorial discretion was offering life to that individual through a plea bargain with a Codefendant, is that fair?

A. Yes, that's basically correct.

MR. SCHWEICKART: Thank you.

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no procedure or format to compare individuals convicted of a capital offense. The Georgia statutes provide a format and specific procedure that the highest court in Georgia must follow. Thus, in Ohio, there is no mandatory review of the individual's particular case by the highest court. By this, petitioner means that the Supreme Court of Ohio did not compare petitioner's sentence of death with the sentence of death in other cases. In fact, the Supreme Court of Ohio misconstrued petitioner's argument when the court stated at page 147 of the opinion:

> [A]ppellant alleges further that Ohio's death penalty scheme does not require review or direct review by the state supreme court. [A]lthough it is true that this court does not directly review cases from the Court of Common Pleas, we believe that the constitutionality of the scheme is not threatened by this procedure. Appellant seems to argue that since the state of Georgia has a provision for direct review of the trial court by its Supreme Court, and since the United States Supreme Court has upheld the Georgia law, then all states must have such a direct review to be constitutional. Such reasoning is clearly erroneous. The United States Supreme Court has never stated that the constitutionality of a state death penalty scheme hinges on whether it provides for direct review by the state Supreme Court. [A]ppellant's argument that the Ohio scheme does not require review is without merit. It is undeniably clear that all convicted defendants in criminal cases have access to the Court of Appeals. Section 2(B)(2)(a)(ii), Article IV of the Ohio Constitution states that this court shall have appellate jurisdiction in appeals from the Court of Appeals as a matter of right in cases in which the death penalty has been affirmed.

What petitioner argued below and is asserting now is that the Supreme Court of Ohio fails to compare the individual sentences of defendants sentenced to death. There was no contention that a criminal defendant on death row did not have access to judicial review. However, in none of the cases decided to date has the Supreme Court of Ohio analyzed or compared the individual's sentence of death to other criminal defendants sentenced to death.

This failure to compare and contrast violates the safeguards of equal protection set down in Gregg, supra and Furman, supra and leads to the same rare random and capricious sentencing of individual criminal defendants without providing the protection enumerated in Gregg, supra.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S APPLICATION OF VIDEO TAPE EQUIPMENT WHICH PROVIDED AN INADEQUATE RECORD OF TRIAL PROCEEDINGS.

In March of 1973 the Court of Common Pleas of Franklin County, Ohio, pursuant to the authorization of the Ohio Supreme Court, and in keeping with the spirit of "progress" awarded a contract to a firm known as Video Record Inc., to conduct experimental video taping of trial proceedings[11/]. The court created a reliance that the video taped trial records would be of equal or superior quality to those recorded by conventional methods. Petitioner so relied to her detriment.

The trial of this cause was recorded on video tape equipment and the resulting record is of such poor quality as to

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11 / Rule 10 and Rule 15 (A) of the Rules of Superintendence, Supreme Court of Ohio, as amended January 29, 1973, provide that:

"Superintendence Rule 10

Verbatim Transcripts; Recording Devices. Proceedings before any court, proceedings before a grand jury, and discovery proceedings may be recorded by stenographic means, by phonogramic means, by photographic means, or by the use of audio electronic recording devices, or by the use of video recording systems.

Proceedings in any court which are recorded on videotape need not be transcribed into written form for the purposes of appeal. The videotape recording constitutes the transcript of proceedings as defined in App. R. 9(A) and Sup. R. 15(H)3. A transcript of proceedings transcribed on videotape shall be transmitted in its entirety as a part of the record.

Transcripts of proceedings transcribed on videotape will be filed with the clerk of the trial court at the conclusion of the trial. Transcripts of proceedings transcribed on videotape and other original records of transcript of proceedings shall be maintained in the trial court in the manner directed by the trial court until the case is finally terminated. (Amended January 29, 1973)"

"Superintendence Rule 15(A)

This rule shall apply to all trial courts of record in this state in the reception and utilization of testimony and other evidence recorded on videotape and to all appellate courts in this state in the review of cases in which the Record on Appeal contains testimony or other evidence transcribed on videotape for use at the trial or where the transcript of proceedings, if any, is transcribed on videotape. (Amended January 29, 1973)"

prohibit a complete review of the trial proceeding. As this was the method chosen by the trial court, that court owed a duty to the petitioner to insure that the appropriate mechanisms were available to completely and competently record and preserve the trial proceedings. To proceed otherwise would be a clear denial of petitioner's Constitutional rights to due process of law and equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Griffin v. Illinois, 351 U.S. 12 (1956), held that the denial of the right of "full Appellate review" constituted a violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Moreover, at Pg. 17 this Court stated:

> Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, so far as law is concerned, stand on an equality before the bar of justice in every American court.

See also Chambers v. Florida, 309 U.S. 227 (1940), wherein this court stated that the intent of the Fifth and Fourteenth Amendments was to "guarantee procedural standards adequate and appropriate . . . to protect, at all times, people charged with (a) crime". [emphasis added].

A complete review of the type-written transcript of this cause, prepared from the video tape record, indicates the following:

1. Said record contains 428 inaudible statements.
2. Said record contains 52 no audible responses.
3. Said record contains 94 unidentified speakers.
4. Nine (9) minutes of the testimony of Officer Daniel M. Canada was not recorded (Tr262, L15; VTR11; 3/6/75, 3:31:10).
5. A portion of the testimony of Officer Ronald Price is missing (Tr649, L18; VTR22, 3/11/75, 3:31:10).
6. A recess, ordered by the Court during trial, is not reflected on the video log (Tr801, L15).

7. A portion of the testimony of Michael Goins is inaudible due to loud screech on tape (Tr633, L2; VTR22, 3/11/75, 2:37:40).

8. A portion of the Court's statement to the jury concerning opening statements is missing (Tr633, L2; VTR22, 3/11/75, 2:37:40).

9. Virtually every bench conference is inaudible.

10. A folder containing twenty-six (26) newspaper articles directly relating to petitioner's change of venue motion, although properly introduced, identified (tr3, L2; VTR10, 3/3/75, 10:14:50), and admitted (Tr244, L8; VTR10, 3/6/75, 11:52:25) is missing from the Court File and cannot be located.

Petitioner contends that the total inadequacy of the transcript of proceedings is due, in part, to the embryonic stage of development in which video tape recordings of trial proceedings finds itself. However, in light of the trial court's responsibility to insure complete and accurate means of preserving the trial record, petitioner finds the use of such equipment in its embryonic stage abhorrent.

Considering the inadequate development of video tape record methodology, it would seem that the personnel employed to operate such equipment would be of the highest caliber in order to assure the maximum efficiency of the system. In the case at bar, however, such was not the case. Many of the defects and inadequacies noted above directly relate to the incompetency of the video reporter assigned to this trial.

A newspaper article that appeared in the Columbus Dispatch on February 5, 1975, indicated a drastic turnover in the personnel of Video Record Inc. In that article Lawrence B. Stone, General Manager of Video Record, Inc., indicated that, although two (2) videotape recording operators had been fired and a third

had resigned in protest, he had "another operator all but ready to bring in (who) just needs a little practice on technique"[12/].

Subsequently, in an affidavit, Mr. Stone indicated that Walter Thomas Scott, the video operator for petitioner's trial, was hired on February 1, 1975, and fired effective July 23, 1975,

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12/ The following article appeared in the Columbus Dispatch newspaper February 5, 1975:

"Videotape Company To Fulfill Contract

Officials of the company that supplies the Franklin County Common Pleas Court with videotape recording operators said Wednesday they can live up to their contract in spite of the loss of three employees since Friday.

Video Record, Inc., 709 South High Street, fired two operators Friday and a third quit Monday in protest of the firings.

The company has a $62,000 a year contract with the county to supply four operators to record criminal proceedings in the courtrooms at the Hall of Justice.

General Manager Larry Stone said the company made it through Tuesday with just three operators, two of them company officials.

'But we have another operator all but ready to bring in,' Stone said. 'The person just needs a little practice on technique.'

Stone said Video has two other operators in training who will be put to work in the near future.

The two fired workers, William Ward and Penny Dixon Seltzer, were dismissed for insubordination, Stone said.

The third employee, Michael Swink, said the firings were 'groundless' and claimed the company had been 'less than truthful' with the employees.

All three workers were told by company officials last week that their salaries would be cut from $675 to $575 a month effective February 1."

when the numerous errors that occurred in the videotaping of petitioner's trial were discovered[13].

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13 / "AFFIDAVIT, FRANKLIN COUNTY, OHIO:

Laurence B. Stone, being duly sworn to tell the truth, says as follows:

That he is the general manager of Video Record, Inc., of 709 South High Street, Columbus, Ohio.

Walter Thomas Scott, the video reporter for the Alberta Osborne trial was hired by Video Record on February 1, 1975. Mr. Scott's immediate background consist of an honorable discharge from the U. S. Navy after which he attended Ohio University in Athens, Ohio, where he received a bachelor's degree in radio-television in 1973.

Upon hiring by Video Record, Mr. Scott went through an intensive training period concerning the operation of the equipment and courtroom procedure orientation. A period of on-the-job training followed, where he worked next to a qualified operator for approximately two weeks. He was then sworn in and operated on his own with minimal supervision.

On July 23, 1975, I was contacted by one of the transcribers at the courthouse concerning the Alberta Osborne case. She informed me that there appeared to be a gap in the testimony of one of the investigating police officers. Since the transcribers work from the audiocassettes, I hoped that the material was missing only from the audiocassettes and was indeed recorded on the videotape. Unfortunately, this was not the case, as I immediately checked the videotapes.

Upon discovering the problem, I personally advised Mr. Welch, Judge Williams, Judge Gillie and Mr. O'Grady of the situation and understand that Mr. Welch contacted defense counsel.

At the conclusion of that day's proceedings (July 23) Mr. Scott reported to me and was advised of his gross error and his resignation was requested, effective immediately. Mr. Scott did resign immediately and has had no further contact with Video Record.

Video Record indeed regrets this whole matter and apologizes for the inconvenience caused thereby. We would, however, point out that the Alberta Osborne case involves some 48 hours of videotaped material and that only eight or nine minutes are missing. Further, to my knowledge, there has been no other similar incidents in the approximately 4,000 hours of material videotaped while Video Record has been under contract with the County.

Further affiant says not.

Laurence B. Stone

Sworn to me and signed in my presence this fourth day of November, 1975.

Carroll E. Thomas, Notary Public
in and for the State of Ohio

My commission expires May 25, 1978."

It is petitioner's contention that Mr. Scott was hired by Video Record Inc. at a time when that organization was in drastic need of new personnel to fill vacancies created by a mass resignation. It is, furthermore, petitioner's contention that because of this personnel shortage, Mr. Scott, an improperly trained and inadequately supervised employee, was assigned to cover this complex trial scarcely one month after his initial employment.

Petitioner cannot overstress the vital importance of a complete and accurate record of proceedings in a case involving her very life; such record is essential to safeguard her right to due process of law and equal protection under the law as those rights are guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT INCORRECTLY CHARGED THE JURY.

At the completion of testimony in a jury trial, it is the duty of the trial court to instruct the jury as to all applicable law on the case. At the completion of a criminal trial, the court must "charge" the jury on each and every element of the crime alleged to have been perpetrated by the defendant. Petitioner contends that there was prejudicial error committed by the trial court in its charge to the jury in the instant case.

In explaining the concept of "complicity", the trial court failed to properly set forth the elements of, and defenses to, that offense as defined in Section 2923.03 of the Ohio Revised

Code [14]. Instead, the court charged on language contained in Section 1.17 of the Ohio Revised Code when, at page 2 of the charge, the court stated:

> [T]he law of Ohio provides that a person who purposely helps, aids, assists or associates himself with another in the commission of a crime is regarded as if he were the principle (sic) offender and is just as guilty as if he personally performed every act constituting the offense . . .

Section 1.17 of the Ohio Revised Code formerly provided that:

> Aidors and abettors. [A]ny person who aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender.

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14 / Ohio Revised Code Section 2923.03, enacted January 1, 1974, comprises Ohio's current complicity law.

"§2923.03 Complicity

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
  (1) Solicit or procure another to commit the offense;
  (2) Aid or abet another in committing the offense;
  (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
  (4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

The court, therefore, charged the jury on the issue of conspiracy with language that became obsolete with the repeal of Section 1.17 of the Ohio Revised Code effective January 1, 1974. With the enactment of House Bill No. 511, Section 1.17 was superseded by the new Section 2923.03 of the Ohio Revised Code.

Accordingly, the trial court erred in not properly charging the jury under the newly enacted Ohio complicity statute as to all of the possible elements and defenses to that crime, and in not explaining the exact meaning of the words that were charged.

Moreover, with its instructions on the alleged offense, the trial court used the terms "aids, helps, assists or associates with the commission of a crime". [emphasis added]. Petitioner urges that the term "associates" was improperly used and left the jury with no alternative but to convict petitioner of the offenses with which she was charged. It is a well established rule of law that the mere association with one who perpetrates a crime does not make an individual a participant in that crime so long as his acts were innocent. In State v. Clifton, 32 Ohio App.2d 284, 290 N.E.2d 921 (1972) the Hamilton County Court of Appeals recognized this principle when it stated:

> The mere association with one who perpetrates an unlawful act does not render a person particeps criminis (a participant in a crime) so long as his acts are innocent.

Thus, the court committed plain error when it failed to properly explain the term "associate" and to properly charge on the elements of complicity under Ohio Revised Code §2923.03.

Furthermore, the court erred when, subsequent to the charge, but prior to the verdict, it answered inquiries from the jury. A review of the record reveals wholesale misunderstanding on the part of the jury and little assistance by the court in

eliminating that confusion 15 /. The jury had sought clarification

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15 / Tr. 1284:

THE COURT: The Court is not (inaudible) provided with the little slip of paper which was handed us, but we believe that it referred to some clarification of the counts one, two and three. Am I correct?

UNIDENTIFIED VOICE: Yes, sir.

THE COURT: Ah -- I wonder if we could ask you, Mr. Ossing, what specifically is desired there? The question is just a little general.

MR. OSSING: Well, on Count One, there were no specifications involved --

THE COURT: That's right.

MR. OSSING: -- and we wondered if that had been an oversight.

THE COURT: No. There is no -- no specifications are provided with that offense of kidnapping.

MR. OSSING: On Counts -- on Count Two, there was a specification indicating a involvement of kidnapping -- involved in that, and there was some question as to why the kidnapping would be involved in number -- Count Number Two and no in -- was not involved in County Number Three.

UNIDENTIFIED VOICE: I believe it is.

MR. OSSING: -- in the specification, it was.

THE COURT: It is, as a matter of fact.

MR. OSSING: We did find that out. It was involved in specification cause they were all identical.

THE COURT: The same two specifications --

MR. OSSING: -- were applied two or three --

THE COURT: -- apply to both counts - two and three. They are the same as we indicated in the paragraph in the charge. Ah -- could you find the charge back in there, Mr. Page? We don't have a copy of the charge, but do you have --

MR. O'GRADY: I have one, Your Honor.

MR. THOMEN: Could we have a minute?

THE COURT: Thank you Mr. (inaudible). This is not the final corrected copy, but this does have the paragraph to which I intended to refer. On -- I think it'd be on page six of your copy which says 'the instructions as to Counts Two and Three may sound confusingly similar to you. The specifications as to each count are indeed the same. The difference between the two counts being that Count Two states a charge of murder purposely and with prior calculation and design, whereas Count Three states a charge of murder while in the act of committing or attempting to commit the felony of kidnapping.' Now, that's in the charge of aggravated murder itself, before the question of specification even arises. The two specifications to the two charges are the same.

of the various charges and specifications. The court allowed not

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15 / (continued)

UNIDENTIFIED JUROR: (Inaudible question).

THE COURT: Counsel have any objections to one of the other jurors?

MR. O'GRADY: No, Your Honor.

THE COURT: -- communicating (inaudible).

UNIDENTIFIED JUROR: The difference -- the essential difference between Counts One and Two -- I mean Counts Two and Three -- are that in Count Two, the -- the murder was premeditated.

THE COURT: Yes, that's the old term for it, yes.

UNIDENTIFIED JUROR: Okay, and in the second -- in Count Number Three, it wasn't thought of until the act of kidnapping was taken place and then it was thought of. (Inaudible words). In other words, the act of murder was not premeditated before the act of kidnapping had taken place. Is that right?

THE COURT: To put it in -- in selective similar terms, yes. Premeditation or prior calculation and design is Count Two.

UNIDENTIFIED JUROR: Count Two.

THE COURT: And murder while in a commission of another felony is Count Three.

UNIDENTIFIED JUROR: But -- but not (inaudible words) before the -- before the kidnapping (inaudible words)?

MR. O'GRADY: May we approach the bench on that?

THE COURT: Surely.

(Conference at the bench concerning the language to be used in explaining the Counts of the charge to the jury.)

THE COURT: Count Three, which is the one you are concerned with -- ah -- indicates the element of purpose -- purposely causing a death -- ah -- while committing or attempting to commit a felony, in this case kidnapping, but the intent to commit a murder in the process of kidnapping need not be present.

UNIDENTIFIED JUROR: Need not be --

THE COURT: Present. That the murder, if it occurred, taking place while or as a result of the kidnapping offense.

UNIDENTIFIED JUROR: Need not have been preplanned.

THE COURT: That's right. As to Count -- as to Count Three.

UNIDENTIFIED JUROR: (Inaudible).

only the foreman but the other members of the jury to enter into

15 / (continued)

THE COURT: Prior calculation and design is necessary for Count Two.

(Background conversation between unidentified persons.)

MR. OSSING: There was one other under Count One. Does -- there's nothing in there to indicate that there was any physical help in kidnapping.

THE COURT: Any physical what?

MR. OSSING: (Inaudible) has to be --

THE COURT: I'm sorry, any physical what?

MR. OSSING: Physical involvement of the kidnapping.

THE COURT: Yes.

MR. OSSING: It states that a kidnapping charge, but it does not state as to whether there had to be a physical involvement.

THE COURT: Well, on page three of the charge, let me read you this paragraph which I'm sure is in the one you have. 'The law of Ohio provides that a person who purposely aids, helps, assists, or associates himself with another in the commission of a crime is regarded as if he were the principal offender and is just as guilty as if he personally performed every act constituting the offense'. That answer that question?

MR. OSSING: I believe so.

THE COURT: Of course, if that element were not found, the person would be not guilty. If found, would be guilty.

(Background conversation among unidentified persons.)

MR. OSSING: May we be excused?

THE COURT: Yes. Does this answer the question --

MR. OSSING: I believe it does.

THE COURT: -- intended in your request? I might ask one other thing. If you are currently aware, it's now a little after three o'clock, that you're going to be in session through the evening hours - or into the evening hours, the people downstairs would like to know in time to prepare an evening meal. And -- ah -- would prefer this to be early rather than late. Five or perhaps six at the latest. Ah -- if you have any idea about how that's coming, why, we'd appreciate knowing, if now now, when you can tell us.

MR. OSSING: I don't feel at this time there would be any need to go into the dinner hour.

THE COURT: Thank you. You may return to the jury room and continue.

an uncontrolled discussion concerning the charge. During this discussion, the court answered questions and made statements not in the charge as well as reiterating portions of the charge. Some of the statements of the court related to "old terms" not properly before the jury (Tr 1287). Additionally, the court re-read a portion of the charge, i.e. aidor and abettor, without the clarification urged above, thereby again exposing the jury to the same misstatement of law.

In this case the court gave incorrect and abstract instructions to the jury and compounded the problem when the jury returned to seek clarification. This constituted prejudicial error as the jury was given incorrect law to apply to the facts in order to determine petitioner's innocence or guilt.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING PETITIONER'S TRIAL PRECLUDED HER FROM RECEIVING A FAIR AND IMPARTIAL TRIAL.

Petitioner submits that the trial court below committed prejudicial error from the time that the summons for special veniremen was issued until the time that the trial ended. The actions of the trial court exposed petitioner to a jury which had been exposed to exhaustive pre-trial publicity thereby denying the defendant a fair and impartial trial in violation of the Fifth and Sixth Amendments to the United States Constitution. The totality of the circumstances surrounding the arrest and trial of the petitioner could not help but lead prospective jurors, exposed to media presentations of materials about petitioner's case, to form opinions and clearly lead to the reasonable likelihood that petitioner could not receive a trial by fair and impartial jurors.

Sections 2945.18[16] and 2945.19[17] Ohio Revised Code provide for the calling of a special venire in capital cases of ".... not fewer than fifty nor more than seventy-five ballots or names ....". Upon selection of this requisite venire, Section 2945.18 provides that the court shall issue such venire to the sheriff indicating "... the persons whose names are so drawn for the day fixed for the trial." Nowhere within the dictates of these two sections does it provide that such venire, as served by the sheriff, contain the style of the case for which such veniremen

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16 / Section 2945.18 Ohio Revised Code

"Venire for jury in capital cases.

When a person indicted for a capital offense pleads not guilty, the clerk of the court of common pleas shall draw from the jury wheel, or draw by utilizing the automation data processing equipment and procedures described in section 2313.07 of the Revised Code, not fewer than fifty nor more than seventy-five ballots or names, as the court directs, and issue to the sheriff a venire for the persons whose names are so drawn for the day fixed for the trial. The venire shall be served and returned by the sheriff at least fifteen days before the date fixed for trial. A copy of such venire and such return shall be served on the defendant at least three days before the date of the trial."

17 / Section 2945.19 Ohio Revised Code

"Special venire in capital cases.

Jurors summoned as provided in section 2945.18 of the Revised Code, not set aside on challenge, together with such number of bystanders having the qualifications of jurors as is necessary to make the number of twelve on the jury, or, if the whole array is set aside, twelve of such bystanders having such qualifications and not set aside on challenge, is a lawful jury for the trial of a person charged with a capital offense. Either party may demand and have a special venire to fill the panel. When it is necessary to summon talesmen, the court on motion of either party shall select them and issue forthwith a venire for such number having the qualifications of jurors as is necessary. Such jurors shall appear at such time as is fixed by the court, but a person in or about the courthouse shall not be selected without the consent of both parties. If a cause has been assigned for trial, and the jury for the trial thereof has been drawn, and the cause continued to another term of court, the jury so drawn shall be discharged and a new jury drawn for the trial of such cause. If such trial has commenced and there is not time to conclude it at the same term of court, the cause may be concluded at the next term of court [Repealed June 3, 1976]."

have been called[18] / [19] /.

Chapter 2313 of the Ohio Revised Code deals with the specific duties of the Commissioner of jurors. Section 2313.25, dealing with the service and return of the venire, dictates that the sheriff is to notify each juror named, indicating the fact that the

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18 / The following is a copy of the summons that issued in petitioner's case:

"JURY SUMMONS, SHERIFF'S OFFICE

Columbus, Ohio February 5, 1975

STATE OF OHIO VS. ALBERTA OSBORNE 74CR-12-2335

Sir or Madam,

I am commanded to summon you to be and appear before the Court of Common Pleas, Office of the Jury Commission, Fifth Floor, Franklin County Hall of Justice, 369 South High Street, Monday, March 3, 1975 at 8:30 A.M. and then and there to serve as a Juror in and for Franklin County.

Herein fail not under penalty of law.

Respectfully yours,

/s/ Harry J. Berkemer

HARRY J. BERKEMER
Sheriff of Franklin County"

19 / The following is a copy of the summons formerly used in non-capital cases.

"JURY SUMMONS, SHERIFF'S OFFICE

Columbus, Ohio

Sir or Madam,

I am commanded to summon you to be and appear before the Court of Common Pleas, Office of the Jury Commission, Fifth Floor, Franklin County Hall of Justice, 369 South High Street, on _____ 1975, at 8:30 A.M. and then and there to serve three weeks as Petit Juror in and for Franklin County.

Herein fail not under penalty of law.

Except for emergencies no excuse from Jury Duty will be granted unless requested at least five days prior to date you are summoned to appear.

Phone 462-3450

Respectfully yours,

/s/ Harry J. Berkemer

HARRY J. BERKEMER
Sheriff of Franklin County"

juror has been named, and giving the term specified for service[20]. Section 2313.26, dealing with orders for additional jurors, indicates that the sheriff shall forthwith notify the jurors so drawn "... in the same manner as other jurors are notified to attend the term or part of a term..." [emphasis added][21].

Nowhere in the Ohio Revised Code is it provided that a summons for jurors in a capital case should contain the style of that case, thereby placing prospective jurors on notice of the

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20 / Section 2313.25 Ohio Revised Code

"Service and return of venire; return to be presumptive evidence (GS§ 11419-27)

The clerk of the court of common pleas shall deliver to the sheriff venires containing the names and addresses of the jurors drawn, and specifying when the jurors shall appear. The sheriff shall notify each juror named therein to attend the term or part of a term for which he was drawn, by serving upon him, at least six days before the commencement-thereof, a notice addressed to him, stating that he has been drawn as a juror for and is required to attend, the term of part of a term specified in the notice. Such notice may be served personally, by mail, or by leaving it at the juror's residence, or at his usual place of business. Before the commencement of a term, or part of a term, the sheriff shall return the venires for that term or part of a term, with his services thereon, and such return and service shall be presumptive evidence of the fact of such service."

21 / Section 2313.26 Ohio Revised Code

"Order for additional number of jurors may be drawn (GC§ 11419-28)

At any time, during the term of a court of record, the court may order an additional number of jurors to be drawn by the commissioners of jurors for the term, or for part of a term, at which the order is made, or for immediate service in a particular case. The order shall specify the number to be drawn, and the time of drawing. The drawing may be made either in open court, under the direction of the judge, or in the ordinary manner prescribed in sections 2313.01 to 2313.46 inclusive, of the Revised Code, except that notice of the drawing is not required to be given, provided that the required officers are present. The sheriff shall forthwith notify the jurors so drawn, in the same manner as other jurors are notified, to attend the term, or part of a term, at the time specified in the order, and make due and proper return of the venires with his service thereon. Such return shall be presumptive evidence of the fact of such service.

Sections 2313.24 and 2313.25 of the Revised Code apply to the notification of jurors drawn under this section."

specific case for which they are being called. However, in this case, the jury summons issued did contain the style of petitioner's case contrary to the procedure followed for the notification of other jurors and, apparently, without reason[22/].

In Caferelli v. State, 12 Ohio App. 91, 17 Ohio L.R. 392 (1919), the Court of Appeals for Summit County specifically held that:

> In prosecutions for first degree murder, the forms of law should be strictly followed, and the provisions of statutes conferring rights in favor of the accused in the method and manner of summoning and impaneling juries are mandatory. [Emphasis added].

Likewise, this court has held the same to be true in capital cases. Cf. Proffitt v. Florida, 96 S. Ct. 2960 (1976). Moreover, on June 8, 1976, the Ohio General Assembly repealed §2945.19 of the Ohio Revised Code.

What, if any, effect did the improper notification of prospective jurors have in this case?

That such form of summons invited inquiry into the nature of this case is borne out by the response of the prospective jurors to questions asked on voir dire examination[23/].

22/ Note

In an effort to so determine why, counsel for petitioner in November, 1975, contacted the Assignment and Jury commissioners as well as the Administrative Judge of the Court of Common Pleas, Franklin County, Ohio. None of these persons was aware of how the court policy of placing the defendant's name on the jury summons in capital cases originated and shortly thereafter, this practice was discontinued.

23/ Q. (Mr. Thomen) "Since you received a subpoena to be here, have you read, seen or heard anything about this case?"

A. (Mr. Miller) "Yeah, in the papers and television." (Tr 81, L7)

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Q. (Mr. Thomen) "Have you had occasion to read anything or hear anything or see anything about this case?"

A. (Mrs. Stevenson) "(Inaudible) Yes, I have."

Q. "You have?"

A. "Um hm, before I got the subpoena I paid no attention towards it. Did read it . . ."

It must appear obvious from the voir dire that the jury

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23 / (continued)

Q. (Mr. Thomen) "And after you got the subpoena, you became interested?"

A. (Mrs. Stevenson) "Well, I wanted to know something of this, so I read it." (Tr93, L1)

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Q. (Mr. O'Brien) "Now sir, after receiving your subpoena, did you have an occasion to either read or hear anything about this case?"

A. (Mr. Ossing) "I have tried to avoid it as much as possible although I did read the article that was in the Sunday paper."

Q. (Mr. Thomen) "And did you read the entire article in Sunday's paper?"

A. (Mr. Ossing) "Yes, sir, I did." (Tr 104, L12)

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Q. (Mr. Thomen) "You have heard about this particular case haven't you?"

A. (Mrs. Smallwood) "Well, I read about it before I got the summons, and I had read a couple of times after that until I found out who it was, you know. I really didn't know when I got the summons for the jury, but I didn't know who it was."

Q. "You mean, like, who it was, the defendant, Alberta Osborne?"

A. "Yes."

Q. "But now do you recall back as to all those things that you read before?"

A. "No."

Q. "You don't recall anything about what you read before?"

A. "No, not really, because the only thing that I can remember is reading about the lady getting killed on Morse Road is all."

Q. "When, can you tell me, did you last read anything about this?"

A. "Well, I read last night's paper." (Tr 106, L9)

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Q. (Mr. Thomen) "Had you heard anything on television or seen anything on television?"

summons issuing from the Sheriff's Office did, in fact, invite

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23 / (continued)

A. (Miss Schneider) "The first . . . the first I ever heard of it . . . when I first got the summons. I speculated as to what the (inaudible) might be accused of, but it didn't say on it and then a week ago, Sunday, when the other man was convicted, I heard the name mentioned in connection with the case." (Tr 118, L13)

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Q. (Mr. Thomen) "Well, ma'm, since you received your subpoena to appear here as a prospective juror, have you had occasion to read, see, or hear anything pertaining to this particular defendant?"

A. (Mrs. Melick) "Well, in the newspaper . . . I really didn't even know what it was when they called me and when they gave it to me, I didn't know what trial it was. He explained to me."

Q. "Well, did you read anything about the defendant?"

A. "You mean before? Are you asking me before the trial?"

Q. "After you received the subpoena?"

A. "Oh, well, I didn't know . . . he didn't tell me I wasn't supposed to. Nobody told me I wasn't supposed to." (Tr 127, L6)

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Q. (Mr. Thomen) "Mrs. Robinson, you said you think you read something about this incident when it or at . . "

A. (Mrs. Robinson) "When it first happened (inaudible) . ."

Q. "First happened? Do you recall anything about what you read?"

A. "No. I read . . . in fact, I didn't complete the article and as when I got my summons, I didn't know who she was until a couple of days after when it was brought to my attention."

Q. "Who brought it to your attention?"

A. "I guess it was my supervisor in a sense because she asked me who it was and I thought it was the attorney. I didn't . . . I didn't well, that's just how much attention I had paid to it." (Tr 142, L20)

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Q. (Mr. Thomen) "I believe you said that you heard of this incident before or right after it happened?"

A. (Mr. Wormly) "Yes."

Q. "And have you continued to read up or follow any of the newspaper items concerning the case?"

inquiry from the prospective jurors into the nature of this case. Such inquiry, coupled with the vast amount of prejudicial pre-trial publicity acted to preclude petitioner from receiving the rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1, §10 of the Constitution of the State of Ohio[24/].

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23 / (continued)

A. (Mr. Wormly) "Well, I read the paper, but I haven't been following up on it."

Q. (Mr. Thomen) "When you received the subpoenas to appear here as prospective juror, did you note the name of the defendant shown thereon?"

A. "Yes."

Q. "Did you make any inquiry to determine what it was all about?"

A. "I had known what it was about."

Q. "You placed receiving the name on your subpoena . . ?"

A. "Right."

Q. ". . . with what you recall about what was in the newspaper?"

A. "Right." (Tr 150, L24)

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24 / Article 1, §10 of the Constitution of the State of Ohio

[Trial of accused persons and their rights, depositions by state and comment of failure of accused to testify in criminal cases.]

"Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to

The prospective jurors in this case were given the style of "their" case in advance, and were provided with an adequate opportunity to familiarize themselves with that case as set forth in the media before trial. It flies in the face of human nature to place persons on notice concerning a matter of such import and expect them not to satisfy their natural curiosity concerning the details of the case involved.

Likewise, once the original venire had been exhausted, the trial court committed the same error when the second special summons was issued.

The trial of petitioner's case commenced on March 3, 1975, at approximately 10:14 A.M. By Wednesday, March 5, 1975, the original special venire being exhausted, the trial court ordered the Clerk of Courts to draw not less than fifty additional names of prospective jurors. These additional jurors were first brought into court and sworn as prospective jurors on Thursday, March 6, 1975 at 10:11 A.M.

This procedure afforded complete media exposure to all prospective jurors called in the second special venire. This exposure to the extensive media coverage given throughout the first three days of this notorious trial obliterated the jurors ability

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24 / (continued)

> the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself, but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)"

to serve fairly and impartially[25/].

25/ Q. (Mr. Thomen) "Have you read any articles this week?"

A. (Mrs. Yerian) "I believe there was an article in last night, or the night before last." (Tr 169, L16)

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Q. (Mr. Thomen) "And I believe you stated that you had read, or seen or heard something concerning this particular incident?"

A. (Mrs. Foster) "I saw it in the paper."

Q. "Did you . . . have you followed it from the start of the stories?"

A. "No, not really."

Q. "When was the last time you read anything in the paper about this?"

A. "Well, I saw it in the paper last night, when I was they were selecting jurors and that's what made me feel that this is what I was called for."

Q. "And did you read that article?"

A. "About selecting the jury?"

Q. "Yes."

A. "Yes." (Tr 205, L4)

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Q. (Mr. Thomen) "Now, I take it that you, too, have read .."

A. (Mrs. Allen) "Right." (Tr 215, L4)

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Q. (Mr. Thomen) "Can you recall when the last article was printed that you read?"

A. (Mrs. Strickler) "Last night."

Q. "Last night's paper?"

A. "Selecting of the jurors."

Q. "Did you read the article in its entirety?"

A. "Yes." (Tr 221, L20)

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Q. (Mr. O'Grady) "Since the time of that incident, have you followed it all continually in the press, of the reporting that may have been done?"

A. (Mr. Pepper) "Yes, I have read, I would say, not all, but I've certainly read a number of articles since then on this case." (Tr 227, L19)

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In Kauffman v. Schauer, 121 Ohio St. 478, 169 N.E.556 (1929) a civil case, the Ohio Supreme Court indicated that a mistrial is appropriate:

> When in the progress of a trial, the court has determined that such error has intervened as would vitiate any verdict that the jury might return and that the error cannot be cured in that trial . . .

The rule in Ohio criminal cases is comparable to the dictates of Kauffman, supra.

> A mistrial should not be ordered and the jury discharged in a criminal case merely because some error or irregularity has intervened if the substantial rights of the accused or the prosecution are not prejudicially affected thereby.

See 15A O. Jur. 2d, 438, §371 Criminal Practice and Procedure.

Petitioner submits that the failure of the trial court to exercise sound judicial discretion and to declare a mistrial did substantially affect her right to trial by a fair and impartial jury.

Illustrative of the continuing error surrounding the selection and seating of the jury was the trial court's complete disregard for the mandatory dictates of Rule 24 (F) of the Ohio Rules of Criminal Procedure[26/].

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26 / Rule 24 (F) Ohio Rules of Criminal Procedure

"Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror."

Carey H. Gall was called as alternate juror number one and was subsequently excused for cause. Simultaneously, with the calling of Ms. Gall, the court called alternate juror number two, Nelly K. Johnson, who was placed in the appropriate seat. The next alternate juror called was Shirley M. Foster, who was improperly seated in the seat previously occupies by Ms. Gall [i.e. alternate juror seat number one].

Rule 24 (F) of the Ohio Rules of Criminal Procedure deals with alternate jurors and, in part, specifically states that:

> Alternate jurors in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. [emphasis added].

Procedurally, Ms. Gall was the first alternate juror to be called, Ms. Johnson was the second alternate juror to be called, and Ms. Foster was the third alternate juror to be called. At such time as Ms. Gall was challenged for cause and removed as a prospective alternate juror, the trial court should have directed Ms. Johnson to take her seat as the next alternate juror called, and the first alternate juror in line for jury duty should the need for her services arise. Ms. Foster, however, was called and directed to sit in place of Ms. Gall in the alternate juror number one seat.

The court proceeded with the calling and voir dire examination of prospective alternate jurors; and, at a point where petitioner had exercised one peremptory challenge to the alternate jurors, and had but one peremptory challenge remaining, counsel for petitioner requested a bench conference concerning a clarification of this seating of alternate jurors. In response to this request, the trial court refused to follow the dictates of Rule 24 (F) of the Ohio Rules of Criminal Procedure, indicated that counse for petitioner's argument was without merit, and further indicated that Ms. Foster would remain in the alternate juror number one seat. At this point counsel for petitioner was placed in a position of tactical uncertainty. Had counsel for petitioner exercised

its sole remaining peremptory challenge to excuse Ms. Foster, petitioner would be faced, under the ruling of the trial court, with a new first alternate juror and no chance for peremptory removal. Feeling that the dictates of Rule 24 (F) of the Ohio Rules of Criminal Procedure were clear in their mandate, counsel for petitioner chose not to challenge Ms. Foster peremptorily, but to renew its objection should the need for the services of an alternate juror present itself.

On the morning of Friday, March 14, 1975, the need for the services of an alternate juror did, in fact, present itself. The court saw fit to sit Ms. Foster as a replacement for juror number two, Betty Dradt, over the strenuous objection of counsel for petitioner[27/].

Due to the inferior technical quality of the video taped transcript, and/or the incompetency of the video tape equipment operator assigned to this trial, counsel for petitioner's complete argument concerning the seating of this alternate juror is not available to the reviewing court. That argument does, however, appear to have been sufficiently noted so as to preserve petitioner's right to appeal thereon.

27/ The record indicates that the following conversation was had:

(The court) ". . . Mrs. Foster, you are Alternate Number One, if you will take the second chair in the jury. You are a member of the jury."

(Mr. Hunter) "Your Honor, for the record and pursuant to the discussion we had this morning, would you please note the Defense's exception . . ."

(The Court) "Yes."

(Mr. Hunter) ". . . pursuant to the Ohio Rules of Criminal Procedure, Criminal Rule 24 (F)."

(The Court) "Exception is noted."

It is the contention of petitioner that the trial court cleraly erred in not following the mandatory dictates of Rule 24 (F), Ohio Rules of Criminal Procedure as such relates to the seating of alternate jurors and thereby denied the petitioner her right to a trial by a jury properly chosen pursuant to that rule.

The language of Rule 24 (F) is similar to the language contained in Ohio Rule of Civil Procedure 47 (C)[28/]. In fact, Criminal Rule 24 (F) is based upon Civil Rule 47 (C) which, in

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28 / Rule 47, Ohio Rules of Civil Procedure

"Jurors

(A) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry.

(B) Challenges to jury. In addition to challenges for cause provided by law, each party peremptorily may challenge four jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."

(C) Alternate jurors. The court may direct that no more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled; two peremptory challenges if three or four alternate jurors are to be impanelled; and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed shall not be used against an alternate juror."

turn, is based upon Federal Rule of Civil Procedure 47 (B)[29] and Federal Criminal Rule 24 (C)[30]. These Federal Rules are

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29 / Federal Rule of Civil Procedure, Rule 47

"(a) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, two peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and three peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror. (As amended Feb. 28, 1966, effective July 1, 1966.)"

30 / Federal Criminal Rule 24

"Trial Jurors

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

applicable in determining the meaning of the criminal rule.

The provisions of Federal Criminal Rule 24 (C) are mandatory. See United States v. Hayutin, 398 F.2d 944 (1968). Ohio Criminal Rule 1 (B)[31] provides, in relevant part, that the criminal rules "shall be construed and applied to secure the fair, impartial, speedy and sure administration of justice . . ." [emphasis added.] In the instant case, the sure administration of justice was dealt a severe blow when the trial court failed to follow the mandatory provisions of Criminal Rule 24 (F). Petitioner had a right to expect the court to follow the procedure as set forth in the rules. Trial counsel planned strategy and attempted to secure a fair trial, only to find that he was no longer operating under the same rules as the court. Applying one set of procedure to one criminal defendant and another set to petitioner denies her

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30 / (continued)

(c) Alternate jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by those rules may not be used against an alternate juror."

31 / Ohio Criminal Rule 1 (B)

"Purpose and construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expenses and delay."

the rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio.

Prior to the commencement of trial, petitioner moved the court for a change of venue pursuant to section 2901.12 (I) of the Ohio Revised Code[32]. This motion was taken under advisement by the

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32 / §2901.12 Ohio Revised Code

"Venue

(A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter and in the territory of which the offense or any element thereof was committed.

(B) When the offense or any element thereof was committed in an aircraft, motor vehicle, train, watercraft, or other vehicle, in transit, and it cannot reasonably be determined in which jurisdiction the offense was committed, the offender may be tried in any jurisdiction through which the aircraft, motor vehicle, train, watercraft, or other vehicle passed.

(C) When the offense involved the unlawful taking or receiving of property or the unlawful taking or enticing of another, the offender may be tried in any jurisdiction from or into which the property or victim was taken, received, or enticed.

(D) When the offense is conspiracy, attempt, or complicity cognizable under division (A) (3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction where the conspiracy, attempt, complicity, or any element thereof occurred.

(E) When the offense is conspiracy or attempt cognizable under division (A) (3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the offense which was the object of the conspiracy or attempt, or any element thereof, was intended to or could have taken place. When the offense is complicity cognizable under division (A) (3) of section 2901.11 of the Revised Code, the offender may be tried in any jurisdiction in which the principal offender may be tried.

(F) When an offense is considered to have been committed in this state while the offender was out of this state, and the jurisdiction in this state in which the offense or any material element thereof was committed is not reasonably ascertainable, the offender may be tried in any jurisdiction in which such offense or element could reasonably have been committed.

(G) When it appears beyond a reasonable doubt that an offense or any element thereof was committed in any of two or more jurisdictions, but it cannot reasonably be determined in which jurisdiction the offense or element was committed, the offender may be tried in any such jurisdiction.

court, said court electing to "reserve decision" thereon until such time as the prospective jurors had been questioned[33]. After the voir dire examination of the jury, the trial court improperly overruled petitioner's motion for a change of venue, finding it ". . . necessary to speculate as to the condition of the minds of the prospective . . . jurors."

It is important to note that petitioner's trial was

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32 / (continued)

(H) When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, he may be tried for all such offenses in any jurisdiction in which one such offense or any element thereof occurred. Without limitation on the evidence which may be used to establish such course of conduct, any of the following is prima facie evidence of a course of criminal conduct:

(1) The offenses involved the same victim, or victims of the same type or from the same group.

(2) The offenses were committed by the offender in his same employment, or capacity, or relationship to another.

(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

(4) The offenses were committed in furtherance of the same conspiracy.

(5) The offenses involved the same or a similar modus operandi.

(6) The offenses were committed along the offender's line of travel in this state, regardless of his point of origin or destination.

(I) Notwithstanding any other requirement for the place of trial, venue may be changed upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial would otherwise be held, or when it appears that trial should be held in another jurisdiction for the convenience of the parties and in the interests of justice."

33 / Note

Petitioner's motion for change of venue was made orally the morning of March 3, 1975. Counsel for petitioner, having been appointed 36 hours prior to commencement of trial, discovered that petitioner's retained counsel had failed to make such motion in writing.

scheduled for March 3, 1975, immediately following the trial of James Kenneth Weind, thereby insuring maximum media coverage. It is also important to note that the media coverage continuing from December 15, 1974 to date of petitioner's trial had exposed the prospective jurors to publicity that in all reasonable likelihood precluded their ability to give petitioner a fair and impartial trial.

The touchstone of any case dealing with pretrial publicity is Sheppard v. Maxwell, 384 U.S. 333 (1966). In Sheppard, this Court established the principle that pretrial publicity may result in a denial of defendant's right to due process of law. More importantly, it also set forth the trial court's responsibility in dealing with the pretrial publicity problem where, at page 363, the Court said:

> ...where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the Judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. [emphasis added].

Other cases have recognized the same principle.

Groppi v. Wisconsin, 400 U.S. 505 (1973), recognized that, often, neither a delay of the trial nor the process of disqualifying jurors is "adequate to effectuate the Constitutional guarantee" of a trial by impartial jurors [at 510]. The court pointed out that, on occasion, "only a change in venue [is] constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment" [at 510], referring to Rideau v. Louisiana, 373 U.S. 723 (1963).

The Ohio Supreme Court has recognized that the Sheppard case has applicability in Ohio cases dealing with pretrial publicity. State v. Fairbanks, 32 Ohio St.2d, 34, 289 N.E.2d 352 (1972). It is crucial to ntoe that under Fairbanks and Sheppard, supra, actual prejudice need not be shown. The mere likelihood of prejudice is sufficient to require the trial court to either continue the case or grant a motion for a change of venue. The Ohio General Assembly has made provision for such a change of venue in Ohio

Revised Code Section 2901.12 (I) and in Ohio Rule of Criminal Procedure 18 (B), thus clearly indicating that no legislative prohibition exists against such changes[34/].

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34 / Ohio Rule of Criminal Procedure, Rule 18

"Venue and Change of Venue

(A) General venue provision. The venue of a criminal case shall be as provided by law.

(B) Change of venue; procedure upon change of venue. Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

(1) Time of motion. A motion under this rule shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier, or at such reasonable time later as the court may permit.

(2) Clerk's obligations upon change of venue. Where a change of venue is ordered the clerk of the court in which the cause is pending shall make copies of all of the papers in the action which, with the original complaint, indictment, or information, he shall transmit to the clerk of the court to which the action is sent for trial, and the trial and all subsequent proceedings shall be conducted as if the action had originated in the latter court.

(3) Additional counsel for prosecuting attorney. The prosecuting attorney of the political subdivision in which the action originated shall take charge of and try the case. The court to which the action is sent may on application appoint one or more attorneys to assist the prosecuting attorney in the trial, and allow the appointed attorneys reasonable compensation.

(4) Appearance of defendant, witnesses. Where a change of venue is ordered and the defendant is in custody, a warrant shall be issued by the clerk of the court in which the action originated, directed to the person having custody of the defendant commanding him to bring the defendant to the jail of the county to which the action is transferred, there to be kept until discharged. If the defendant on the date of the order changing venue is not in custody, the court in the order changing venue shall continue the conditions of release and direct the defendant to appear in the court to which the venue is changed. The court shall recognize the witnesses to appear before the court in which the accused is to be tried.

(5) Expenses. The reasonable expenses of the prosecuting attorney incurred in consequence of a change of venue, compensation of counsel appointed pursuant to Rule 44, the fees of the clerk of the court to which the venue is changed, the sheriff or bailiff, and of the jury shall be allowed and paid out of the treasury of the political subdivision in which tha action originated."

Ohio Revised Code Section 2901.12 (I) provides that:

> (I) Notwithstanding any other requirement for the place of trial, venue may be changed upon motion of the prosecution, the defense, or the Court, to any Court having jurisdiction of the subject matter outside of the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial would otherwise be held, or when it appears that the trial should be held in another jurisdiction for the convenience of the parties and in the interest of justice. [emphasis added].

It was the clear intent of the Ohio Legislature to assure a criminal defendant a fair trial by an impartial jury which is a substantive right guaranteed by the United States Constitution.

What, then, are the operative facts of the instant case that made such a fair and impartial trial impossible?

The trial of Alberta Osborne was scheduled between the trial of James Weind and Carl Osborne. The case was one to which substantial press coverage was given and, on the first morning of the trial, counsel for defendant offered twenty-six separate newspaper clippings which had appeared in a local newspaper since the date of the incident. This exhibit included an article that had appeared in the Columbus Dispatch the preceding day with a picture of petitioner and a recounting of the testimony offered in the trial of James Weind. In fact, a radio account of the trial was carried on major radio networks in the Central Ohio area on the morning of Monday, March 3, 1975.

The voir dire examination of the jury illustrates that virtually all of the veniremen had been exposed to the media coverage of this case. In fact, the trial court showed an awareness of the problem when, speaking of the press, the Court stated, "It is difficult to see how anything they say would be more prejudicial than anything they've already said or will continue to say." [Tr 428]. The community was staurated, from December 15, 1974 until the close of trial on March 18, 1975, with numerous articles describing not only the crime and arrest of the alleged perpetrators, but, accounts of the trials of all involved and summaries of each days testimony.

The cumulative effect of this myriad of publicity cannot be ignored or denied nor should it be ignored or denied.

Although the Sixth Amendment guarnatee to trial by an impartial jury has been extended to the citizens of every state by the Fourteenth Amendment to the United States Constitution, we are still faced with a competition of interests. See Duncan v. Louisiana, 391 U.S. 145 (1968). The accused's right to a speedy trial, the availability of witnesses, freedom of the press and the expense and inconvenience associated with a change of venue must all be weighed against the accused's constitutional right to a trial before an impartial jury. The question that must be asked is, what value can a person or a Court put upon the rights of a citizen of this country. The petitioner maintains that the constitutional requirements guaranteeing a criminal defendant a fair and impartial jury trial out-weight any considerations of monetary expenditure. This, of course, becomes paramount when that criminal defendant is on trial for his or her very life.

As a collateral issue, we must determine whether the First Amendment guarantees of the freedom of the press out-weigh the Constitutional guarantee to a fair and impartial trial. When dealing, as here, with a case involving petitioner's very life, there can be no doubt that the rights of the individual must prevail. Sheppard, supra, at 362. A review of the newspaper accounts above indicates a level of reporting calculated to entice the passions of the reading public. It's all there: sex, jealousy, passion, violence, intrigue and sorrow.

This Court's attention is directed to Forsythe v. State, 12 O. Misc. 99, 230 N.E.2d 681 (1967), setting forth the principle that where there is a likelihood that prejudicial news prior to a trial will prevent a fair trial, and where it is determined that a continuance will not remove that threat, the case should be transferred to another jurisdiction that has not been saturated with publicity surrounding the case. The Court went on to note that an

actual showing of prejudice was not necessary in order for a court to grant a change of venue. It must be emphasized that a court has two distinct options when dealing with prejudicial pretrial publicity; (1) the court may grant a continuance or, (2) the court may grant a change of venue.

In State v. Fairbanks, supra, the Supreme Court of Ohio held:

> A motion for change of venue is properly denied where there was but a single newspaper article and several radio broadcasts two days after defendant's arrest, which were factual, non-inflammatory and without distortion, and it is apparent to the Court that such news coverage did not give rise to a reasonable likelihood that defendant will not receive a fair and impartial trial, especially when all the veniremen had disclaimed knowledge of such news reports, or had affirmed during voir dire that they will judge the defnedant solely on the facts established in the trial in the light of the law applicable. [emphasis added].

With the above case, the Ohio Supreme Court has placed a clear duty upon the trial courts of that State: If the Court can ascertain that there is any reasonable possibility that a criminal defendant, on trial for a capital offense in which his life may be forfeited, will not receive a fair and impartial trial, it is incumbent upon the trial judge to grant a change of venue so that the rights of the accused are not prejudiced. Under Fairbanks, supra, we have only two to three mass media reports and the Court concluded that they were factual and non-inflammatory. Such is not the case here! Many of the articles surrounding this case dealt with non-factual material that was based upon speculation by the media. In addition, one has only to read the article that appeared in the Columbus Dispatch, Sunday, March 2, stating that the victim and her husband were going to return to Kentucky and build a new life together to realize, that the pretrial publicity was highly inflammatory and prejudicial to petitioner's rights[35/].

35/ Article in Columbus Dispatch on Sunday, March 2, 1975.

The Court in Fairbanks went on to establish a dual test

35 / (continued)

"Mrs. Osborne Goes on Trial

Edgel Ross decided last fall to move back to his native Kentucky. He and his wife, Hermalee, were going to start over again in a home he had built near Red Bush.

Ross testified in Franklin County Common Pleas Court that he broke off his relationship with Alberta Louise Osborne after he decided to move.

'I told her she would be on her own,' Ross said.

Mrs. Osborne, a divorcee, goes on trial in Common Pleas Court Monday on charges of kidnapping and aggravated murder in the Dec. 15 abduction-slaying of Ross' wife.

The prosecution charges that Mrs. Osborne, 51, of 2395 Clarkston Lane, hired her son and another man to kill the wife of her lover.

She is the second of three defendants to stand trial in the case.

Last week, James Kenneth Weind, 25, formerly of 2209 Wabash Ct. was convicted of kidnapping and aggravated murder. A hearing is scheduled April 14 to determine if Weind will face the death penalty.

Mrs. Osborne's son, Carl Edward, 21, of the Clarkston Lane address, is also charged with kidnapping and murder.

Police say Osborne, who had occasionally worked for Ross, used a 25-caliber pistol to fire two slugs into the back of Mrs. Ross' head in an abandoned Delaware County schoolhouse.

Mrs. Ross, 49, who lived with her husband at 31 N. Franklin Street in Hilliard, had been abducted less than an hour before she was killed. She was taken from the parking lot of a Morse Road supermarket where she worked.

Ross detailed his five-year affair with Mrs. Osborne during Weind's trial. He testified his only interest in the woman was sex, that he did not love her, and that he did not plan to see her after he moved to Kentucky.

'But she wasn't going to have any of that,' Asst. Prosecutor James J. O'Grady told Weind's jury. 'She was going to have that lady killed . . . she sat up with two young men and planned it out. Then they used her gun to do it,' O'Grady said.

O'Grady and Asst. Prosecutor Ronold O'Brien, who prosecuted the state's case against Weind, will prosecute Mrs. Osborne. Attorney Ralph Thoman will represent the defendant.

Judge William T. Gillie is hearing the case.

Osborne is scheduled to be tried before Judge Herman Marshall March 17."

whereby prospective jurors must assert that they have not read anything concerning the case, or assure the court in absolute terms that what they have read, seen or heard would have no effect on their decision in the case.

The trial court, when talking with the prospective jurors, pointed out that the media had given this case a degree of notoriety:

> We are, of course, aware that this case has received some publicity in the community and so it perhaps would be a foolish and vain question to ask whether there is anyone in the jury who has heard about the case before. Usually people have not heard anything about the cases which appear before the court. Perhaps we should ask it the other way around. Is there anyone on this jury who has not heard of this case before coming to the Hall of Justice today?

It should not be surprising that none of the prospective jurors responded to this question. What is surprising is that the trial court, after this admission, would expect jurors to respond affirmatively when asked whether they were biased, prejudiced or closed minded! Instead of granting petitioner's motion for a change of venue based upon the appearance that a fair and impartial trial could not be had, the trial court chose to sit as a super legislature in overruling this motion when he found it necessary to "speculate" as to the degree of prejudice instilled by the pretrial publicity. [Tr 244-245]. The very necessity of the trial court to speculate should have been sufficient grounds upon which to sustain petitioner's motion and thereby maintain the dignity of a human life.

The publicity in this case precluded the possibility of petitioner receiving a fair and impartial trial. When considered with the special jury summons it becomes all too clear that each juror who sat in judgment of petitioner was subjected to vast amounts of publicity both before and after entering the court room. Clearly, the reasonable likelihood that defendant would not receive a fair trial existed and the court took no action to protect petitioner's right.

Likewise, trial court committed error which was prejudicial to petitioner when it failed to sustain petitioner's motion to have the jurors sequestered. The separation of jurors is authorized by Section 2945.31 of the Ohio Revised Code, which provides, in part, that:

> After the trial has commenced, before or after the jury is sworn, the court may order the jurors to be kept in charge of proper officers . . .[36].

See also Lotz v. Sacks, 292 F.2d 657, (6th cir, 1961). As previously stated, this was a sensational case that received a great amount of media coverage and amassed a great amount of public sympathy toward the family of the victim.

There can be do doubt that prejudicial publicity continued during the course of petitioner's trial and had an adverse effect upon the jury. In fact, two jurors admitted disregarding the trial court's instructions and reading newspaper accounts of the trial[37].

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36 / Section 2945.31 Ohio Revised Code

"Separation of jurors. After the trial has commenced, before or after the jury is sworn, the court may order the jurors to be kept in charge of proper officers, or they may be permitted to separate during the trial. If the jurors are kept in charge of officers of the court, proper arrangements shall be made for their care, maintenance, and comfort, under the orders and direction of the court. In case of necessity the court may permit temporary separation of the jurors."

37 / Q. (Mr. Thomen) "You did read the paper last night?"

A. (Mr. Richardson) "Yes, sir. About the jury. That's all."

Q. "You read the entire article?"

A. "Yes, sir." (Tr 79, L7)

- - -

Q. (Mr. Thomen) "You read last night's paper?"

A. (Mrs. Smallwood) "Yeah, where they had selected the jury and all that. Some of that last night."

Q. "Were you in the courtroom yesterday when the Judge admonished you all not to read the paper?"

A. "Yes." (Tr 107, L2)

- - -

It is for this very reason that petitioner was deprived of her right to a trial by a fair and impartial jury as that right is guaranteed to petitioner under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §10 of the Constitution of the State of Ohio.

In the instant case the trial court had ample opportunity to take positive action which would have protected the rights of petitioner. Instead of taking such positive action, the trial court chose to whittle away the constitutional protections of a criminal defendant on trial for her life.

A trial court must take every reasonable precaution to insure the rights of a criminal defendant to a fair and impartial trial. A trial court has the duty to protect the defendant by "traditional methods of voir dire, continuances, changes of venue, jury instruction" and/or "sequestration of the jury". Cf. State, Ex Rel., v. Kainrad, 46 Ohio St.2d 349, 348 N.E.2d 695 (1976).

In the instant case the totality of the circumstances clearly indicated that petitioner would not receive a fair and impartial trial. Yet with all the indications before it, the trial court took no action to protect the rights of petitioner. Petitioner urges that, for the reasons set forth herein, her conviction should be overturned.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that serious constitutional questions are at issue in the instant case and requests that the Petition for a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio was mailed to George C. Smith, Prosecuting Attorney for Franklin County, at the Franklin County Hall of Justice, 369 South High Street, Columbus Ohio 43215, and also to William J. Brown, Attorney General for the State of Ohio, at the State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, by regular first class mail, postage prepaid, this 23rd day of May, 1977.

James K. Hunter III
Counsel for Petitioner

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

State of Ohio,

Plaintiff-Appellee,

v. No. 75AP-327

Alberta Osborne,

Defendant-Appellant.

D E C I S I O N

Rendered on May 11, 1976

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HOLMES, J.

This matter involves the appeal of a judgment of the Common Pleas Court of Franklin County upon a verdict of the jury convicting the defendant-appellant on three counts. The first count was for kidnapping in violation of R. C. 2905.01; the second count of the indictment charging aggravated murder in violation of R. C. 2903.01(A), with two specifications of aggravation, i.e., that the homicide was for hire, per R. C. 2929.04(A)(2), and that the murder was in the course of a kidnapping, per R. C. 2929.04(A)(7). The third count of the indictment was for aggravated murder in violation of R. C. 2903.01(B), done in the course of kidnapping, which set forth the same two specifications as listed in count two.

The defendant-appellant entered pleas of not guilty to all three counts in the indictment. After a full and complete trial on all issues hereof, and the submission of such issues to a jury, the jury convicted the defendant of count one and count two, with one specification that the homicide was for hire, and convicted defendant of count three, with one specification that the offense was for hire. The appellant was found not guilty of the specifications in counts two and three, that the offense was done in the course of a kidnapping.

A mitigation hearing was held as required by R. C. 2929.02, .03, and .04. The trial court, after hearing the testimony of the appellant and appellant's brother, as well as the testimony of psychiatrists, found that there had been no mitigation shown as provided by R. C. 2929.04(B), and then sentenced the appellant to death, as required by law.

The basic facts giving rise to the indictment of this appellant, the verdict and judgment of conviction, and to this appeal, are basically as follows.

On December 15, 1974, the deceased, Hermalee Ross, was abducted by two men from the parking lot of the Ontario store on Morse Road in Franklin County, and was later found in an abandoned schoolhouse in Delaware County, with bullet wounds in the back of her head, and with apparent wounds and abrasions which had been occasioned by being struck a number of times upon her head by some type of flat or dull instrument.

The evidence, as adduced by the state at the trial hereof, showed that an eyewitness, who was in a laundromat in the shopping center near the Ontario store on Morse Road, had observed a tall Negro, dressed in Levis and wearing a blue and white bandanna, engaged in a scuffle with a person in the lot and then saw him leaving in a bluish green automobile, along with another occupant.

Deputies in Delaware County testified that they had responded to a call from neighbors residing near the schoolhouse where the deceased had been found. The report by the neighbors, Mrs. Dorothy Hale and her son, was to the effect that they had observed two males pull up in front of the school in a bluish green automobile, remove a female, and take her inside, and later observed the two men leave the schoolhouse without the female. Mrs. Hale's home is located approximately 150 yards from the schoolhouse.

Through investigation by the police, and interrogation of Edgel Ross, the husband of the deceased, an illicit relationship between the defendant and Mr. Ross was discovered.

Photos of the defendant's family cars were shown to the witnesses who had observed the scuffle in the parking area at the Ontario store and to Mrs. Hale and her son; all of the witnesses identified the photo of a bluish green 1969 Plymouth automobile as being the one that they had previously seen. Such automobile, it was later shown, was that of the defendant's daughter, Kay Osborne.

The bullets, as retrieved from the victim and also retrieved from the scene of her death, were determined to be from a Titan, .25 caliber automatic pistol. A prisoner in the Franklin County Jail, one Michael Goins, who was under indictment for another crime, assisted the police in the recovery of a Titan .25 caliber automatic pistol which had been abandoned in Alum Creek in Franklin County. There was testimony at the trial that such gun as recovered was the murder weapon.

Goins testified that one James Weind had thrown the weapon into Alum Creek on December 15, 1974, the day of the homicide, and that such disposal had been in the presence of Goins and another man.

Goins also testified that in the early morning hours of December 15, 1974, Weind, who was with Carl Osborne, Jr., the defendant's son, was in Kay Osborne's automobile, as referred to previously, and that at such time Weind had borrowed a .380 automatic pistol from Goins.

Kay Osborne, daughter of the defendant, testified that her brother Carl, and Weind, had borrowed her automobile about 6 a.m. on the morning of the homicide, and returned to their home about 10 a.m., and that they, along with her mother, had scrubbed the inside of the car. Kay Osborne also testified that on this day her mother told her that she could not drive her own automobile to work, as additional cleaning had to be done because Weind had been drinking in the automobile the night before and had become ill in the car. There was testimony by the police expert that there had been blood stains found on the back seat of Kay Osborne's car, and also that there was blood found on Weind's shoes.

Kay Osborne also testified that her mother had installed new carpeting and seat covers in her car. There was evidence also that at or near the schoolhouse where the deceased was found there was a very clear tire imprint taken by the police investigators. Kay also testified that her mother had, two days after the date of this incident, replaced all of her tires with new tires, even though at least one of such tires did not need replacement.

Finally, Kay Osborne testified as to the most incriminating evidence against her mother, to the effect that her mother had told her that she was going to lose the companionship of Mr. Edgel Ross because Mrs. Ross had found out about the illicit relationship. Kay testified that her mother told her that she had hired her son Carl and his friend Jimmy Weind to perform the abduction and execution, all for the sum of $325.00.

The defendant, upon being arrested and indicted, filed a motion for change of venue on the basis that this homicide and the circumstances surrounding this family involvement had occasioned a great deal of news media coverage and public attention in Franklin County. The trial court denied such motion, and the matter proceeded to trial and verdict as previously stated.

The defendant appeals herein, assigning the following assignments of error:

> "(1) The trial court erred in failing to sustain defendant's motion for a change of venue thereby depriving defendant of her constitutional right to a trial by a fair and impartial jury.
>
> "(2) The trial court erred in permitting summons for special veniremen to issue bearing the style of defendant's case thereby inviting inquiry by prospective jurors and depriving defendant of her constitutional right to a trial by a fair and impartial jury.
>
> "(3) The trial court erred in failing to declare a mistrial at such time as the original venire had been exhausted and in issuing a summons for additional jurors who had been exposed to prejudicial trial publicity, thereby depriving defendant of her constitutional right to a trial by a fair and impartial jury.
>
> "(4) The trial court erred by not following the mandatory dictates of Rule 24 (F) of the Ohio Rules of Criminal Procedure and improperly permitting an alternate juror to replace a regular juror thereby substantially affecting the rights of the defendant.
>
> "(5) The trial court erred in failing to sustain defendant's motion for a sequestration of the jury thereby depriving defendant of her constitutional right to a trial by a fair and impartial jury.

"(6) The trial court erred in failing to insure that an adequate trial record was made thereby substantially affecting the rights of the defendant.

"(7) The trial court erred in admitting State's Exhibits 17-F, 37, 32, 35-D, 19, 35-E, 27-A, 40, and 44, over objection of defendant thereby substantially affecting the rights of the defendant.

"(8) The trial court erred in overruling defendant's objection to the introduction of testimony offered by prosecution witness Michael E. Goins relating to extrajudicial declarations of James K. Weind.

"(9) The trial court erred in permitting prosecution witness Marie Jordan to testify in direct violation of the separation of witnesses ordered by the court at the commencement of trial.

"(10)(A) The trial court erred in failing to order the entry of a judgment of acquittal at the conclusion of all evidence offered on behalf of the State of Ohio.

"(B) The trial court erred in failing to sustain defendant's motion for a judgment of acquittal of the guilty verdict returned to specification number two (2) to counts Two (2) and three (3) of the indictment.

"(11) The trial court erred in permitting the jury to consider all counts of the three count indictment returned against defendant, and in not requiring the state of Ohio to elect between counts two (2) and three (3) of the indictment.

"(12) The trial court erred in failing to properly and adequately charge the jury, and in permitting uncontrolled questioning by members of the jury concerning portions of the charge, thereby placing improper emphasis on portions of the charge and substantially affecting the rights of the defendant.

"(13) The jury verdict of guilty to the charges of kidnapping (count 1) and aggravated murder (counts 2 and 3) as well as to the specifications that the act was done for hire (specification No. 2, Counts 2 and 3) is against the manifest weight of the evidence.

"(14) The jury verdict of guilty to the charges of kidnapping (count 1) and aggravated murder (counts 2 and 3) as well as to the specifications that the act was done for hire (specification No. 2, Counts 2 and 3) is not supported by sufficient evidence and is contrary to law.

"(15)(A) Sections 2903.01, 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code permit the rare, random and arbitrary imposition of the punishment of death in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

"(B) The death penalty constitutes cruel and unusual punishment in direct contravention to the Eighth and Fourteenth Amendments to the Constitution of the United States."

Assignment of error number one does indeed present a difficult question as it would relate to this and other criminal matters which, because of their news value, are given more than the normal amount of media coverage. It cannot be denied that this matter was one of those cases with a fact pattern which was given what could be considered as a higher degree of coverage than the average criminal case, or even greater than generally afforded a homicide. However, we hasten to add that we are unable to state that such coverage was of such a nature that a "fair and impartial trial" could not be provided this defendant in Franklin County.

The court, in the instant case, prior to ruling on the motion for change of venue, quite reasonably reserved the ruling until the jury could be questioned upon the effect of such media coverage of this homicide and the surrounding facts, and whether, if they had been exposed to such

pretrial publicity, they had formed or expressed opinions as to the appellant's guilt or innocence. Such an examination of jurors prior to trial of a matter, in order to determine whether the pretrial exposure to the news of the case to be tried had affected their views of the matter, was approved in the case of *State v. Johnson* (1972), 31 Ohio St. 2d 106.

A review of the record in this matter will support the state's position that the answers as given by members of the jury show that the media coverage of this homicide had not occasioned their predetermination of the issues to be presented.

The voir dire of the jury reveals that the jurors selected either had not heard of the case or, if they had, that they had not formed or expressed an opinion as to defendant's guilt or innocence, and that the jurors had expressed to the counsel for the state and for the defendant, as well as to the court, that they would base their verdict solely upon the evidence as presented in the trial of this matter.

There are undeniably those types of cases with more bizarre facts and circumstances that result in considerably more massive pretrial coverage by the news media. Such cases, in turn, occasion a great deal of general public attention to the criminal matter to be tried which, in the past, has affected the free and independent determination by a jury. Such situations result in a setting within which the defendant may not be given a fair and impartial trial. Such was found to be the situation by the Supreme Court of the United States in the notable case of *Sheppard v. Maxwell* (1966), 384 U. S. 333.

The *Sheppard* trial was, of course, one of the most publicized trials of all time. As stated by Judge Bell in the decision of the Ohio Supreme Court, in *State v. Sheppard* (1956), 165 Ohio St. 293, in reviewing Sam Sheppard's conviction: "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. * * *" In such decision, Judge Bell, in alluding to the facilities provided for the press and the attention given by the press to the trial, stated: "In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."

Here the evidence does not show that the media coverage was either of the volume or the sensationalism as that in the *Sheppard* case. What is of greater importance here is that the record shows that the interrogation of the jurors on voir dire evidenced that they would give their attention to the evidence as presented at the trial, that they had no preconceived ideas about the guilt or innocence of this defendant, and that they would afford the defendant a fair and impartial trial.

The granting or denial of a motion for change of venue in a criminal matter is within the sound discretion of the trial court. *State v. Johnson, supra; Hawkins v. State* (1928), 27 Ohio App. 297. We feel, upon a review of the record herein, that the jurors could have, and did afford this defendant a fair and impartial trial. We hold that the trial court did not abuse its discretion in denying the motion for change of venue of the trial of this matter. Therefore, assignment of error number one is hereby overruled.

In assignment of error number two, the appellant claims that service of the subpoenas upon prospective jurors where the subpoenas contained the syle of the case constitutes error, in that the prospective jurors would then know the name of the defendant in the trial upon which they were sought to serve. The appellant argues that this knowledge would automatically arouse an interest in such case, and occasion additional attention to the facts of the matter and would result in a biased or prejudiced panel.

With this argument we are unable to agree. The mere knowledge of the case upon which the jurors had been called to sit would not necessarily occasion additional attention being given to the pretrial news coverage, nor would it per se occasion a preconceived idea of the guilt or innocence of the defendant. In the same sense as applicable to the first assignment of error, the questioning of the jurors on voir dire, and their answers thereto, would show that the jurors indicated that they could in fact remain free and impartial in their deliberation and determination of the issues presented and the guilt or innocence of this defendant. This assignment of error is also hereby overruled.

In assignment of error number three, the appellant argues that there had been an improper calling of additional jurors upon the exhaustion of the original venire.

Upon review of the procedure as carried out by the court here in calling additional jurors, we find that such was in conformity with R. C. 2945.18 and R. C. 2945.19, and therefore no error was committed. This assignment of error is therefore dismissed.

As to assignment of error number four, we hold that Rule 24 (A) relating to the seating of alternate jurors, as such rule specifically relates to seating "in the order in which they are called," is directory in nature, rather than mandatory, and that there was no violation of such rule in seating the alternate jurors out of specific numerical sequence. In any event, there was no prejudicial error shown to have resulted from the seating of the alternate jurors other than in the specific order in which they were called. This assignment of error is hereby dismissed.

As to assignment of error number five, we find that the trial court took a great deal of care and gave considerable attention to giving admonitions to the jurors not to discuss the case with anyone, and not to read or listen to any commentary on this case while sitting as jurors. The matter of the sequestering of the jury is vested within the sound discretion of the trial court, and we find within the reading of this record that there was no abuse of discretion upon the part of the trial court. This assignment of error is also hereby dismissed.

Assignment of error number six concerns itself with the audio-video taping process and argues that such process is not an adequate or reasonable form of providing the official record for appellate review. Suffice it to say that this court has, in the past, expressed itself on the disadvantages and difficulties inherent within this form of appellate review. However, we are unable to say that this form of a record, and the appellate review of either the video, or the typed record as made from the sound

cassette tape recorded concurrently with the videotape, presents reversible error. Even though the quality of the typed record leaves a great deal to be desired, if questions as to language or voice source occur on the face of such a record, they can be clarified by a review of the audio-videotape, always available to counsel in the facilities as provided by this court.

Parenthetically we might comment that it is fortunate for both counsel, as well as this reviewing court, that the experiment as to the use of videotape for purposes of providing the official record for appellate review is no longer in process within this county. However, for reasons as stated herein, this assignment of error is also dismissed.

As to assignment of error number seven, relating to the claimed error of the trial court in admitting, over objection, certain state's exhibits, we hold that the admission of such exhibits was proper in all respects, and that there was no abuse of discretion on the part of the trial court in this regard. This assignment of error is hereby dismissed.

In assignment of error number eight, the appellant argues that the testimony of the state's witness Goins as to the out-of-court statements of James Weind was hearsay, and was not admissible in that there were no facts presented which could have established an allowable exception to the prohibition of the introduction of such out-of-court statements.

One such statement as attributed to Weind was allegedly made on December 15, 1974, prior to the homicide, to the effect that he had a job to do and that it would involve bloodshed. Another statement as attributed to

Weind was one which had implicated Carl Osborne, Jr., in the circumstances surrounding the homicide. There was the further testimony of Goins concerning the events after the homicide, when he went with Weind to dispose of the gun in Alum Creek. He testified in effect that Weind had said that he and Carl Osborne "had murdered somebody with this gun. He said Carl pulled the trigger on it."

In *State v. Carver* (1972), 30 Ohio St. 2d 280, the Supreme Court of Ohio set forth one of the exceptions to the hearsay rule when it stated, at page 287 of the decision:

> "Further, the existence of a conspiracy to rob having been established by other evidence, this extrajudicial statement of a co-conspirator, made in furtherance of the objectives of that conspiracy, is admissible as an exception to the hearsay rule.
> * * *"

Here there was evidence by way of the testimony of the defendant's daughter, Kay Osborne, to the effect that the defendant had stated that she had paid her son Carl and James Weind to kill Mrs. Ross. Further, as to the involvement of this defendant and the defendant's son, as well as James Weind, in this conspiracy, culminating in the death of Mrs. Ross, we find the following very convincing evidence by way of the testimony of Kay Osborne at pages 803 to 805 of the record:

> "Q. Did your mother indicate that night at the Holiday Inn to you as to where this event may have started?
>
> "A. She told them what time Mrs. Ross went to work and they were to follow her from her house to work.

"Q. Do you recall where Mrs. Ross worked? Did she indicate to you?

"A. Ontario Food Store.

"Q. Did she indicate what happened on the parking lot at the Ontario Store that morning?

"A. They either went ahead of Mrs. Ross or gotten there before her or something. Jimmy raised the hood of another car. Got out of my car and raised the hood of another car and acted like he was working on it. Then my brother called Mrs. Ross to the car and stated that he had something to say to her about Ed and my Mom. So when she reached the car, Jimmy grabbed her from behind and started beating her in the head with his gun. When he was beating her, the trigger broke off his gun.

"Q. On Jimmy's gun?

"A. Yes.

"Q. Did your mother indicate to you, Kay, that night at the Ontar -- at the Holiday Inn where Mrs. Ross was taken from the Ontario Lot?

"A. She was taken and put in the back seat of my car and they took her to a schoolhouse in Delaware.

"Q. Did she indicate to you what happened at the schoolhouse there in Delaware?

"A. She said they took her inside and since Jimmy's gun was broke, Carl shot her in the back of the head.

"Q. Did she indicate to you, Miss Osborne, whether or not Mr. Weind and her son Carl returned to the house that morning?

"A. After they'd shot her, they came back.

"Q. Did she indicate anything to you about what was going on that morning with the bucket and --

"A. That it was blood inside my car from where they -- she must have bleeding when they beat her and Jimmy cut the carpet out where the biggest piece of blood was and burned it and then they took it to a professional cleaners and had it cleaned.

"Q. Did your mother indicate anything to you that night, Kay, about why the tires on your car had been changed?

"A. She said while they were up there, there was gravel or something in front of the place and they thought that they had left tire tracks, so when anticipating what to do, first, they were going to blow up my car and they changed their mind about that. So then they got new tires on the car and threw away the other tires.

"Q. Did she indicate to you, Miss Osborne, where the tires were thrown?

"A. She said that they were thrown in different parts of the river.

"Q. Did she indicate who did that?

"A. Her and Carl.

"Q. That evening at the Holiday Inn did your mother indicate to you why this was done?

"A. She said that Ed was leaving her."

We hold that such testimony reasonably established a prima facie case that there had indeed been a conspiracy between the defendant, her son and Weind. There being such a prima facie case made on this issue of conspiracy, testimony on the out-of-court statements of Weind was permissible. This assignment of error is also hereby dismissed.

The appellant's ninth assignment of error advances the argument that it was prejudicial error for the trial court to permit a witness to testify who had heard the court's order of separation of witnesses, but yet stayed within the courtroom and heard most of the testimony presented at the trial.

Here the complained of testimony was that of the sister of the defendant's former husband, Carl Osborne, Sr. Such witness had not been subpoenaed by the state as a witness in their case. She was called for the limited purpose of rebutting testimony of Carl Osborne, Sr., which testimony had been supportive of an alibi presented by the defendant.

There is no evidence of procurement, connivance or bad faith surrounding this witness' presence in the courtroom during the proceedings, and the allowance of such testimony by this witness is within the sound discretion of the court. See *State v. Cox* (1975), 42 Ohio St. 2d 200. We find that there has been no abuse of discretion in this regard by the trial court and therefore dismiss this assignment of error.

Assignment of error number ten argues that the court erred in overruling the defendant's motion for acquittal at the conclusion of the state's case, and overruling the defendant's motion to set aside the verdict.

A review of all of the evidence leads this court to the strong conclusion that there was adduced at the trial hereof sufficient evidence to go to the jury in the first instance, and it was well within the province of the jury as the trier of the fact to weigh the evidence and to consider the credibility of the witnesses. The record supports the finding by the

jury that this defendant was guilty beyond a reasonable doubt. Such a verdict is not against the manifest weight of the evidence. This assignment of error is therefore dismissed.

The appellant argues in assignment of error number eleven that the trial court erred in not granting the defendant's motion that the state elect to proceed either under count two of the indictment or count three of the indictment, pursuant to R. C. 2941.25, before submission of the issues to the jury.

This court, in *State v. Fluellen*, unreported case number 74AP-138 (1974 Decisions, page 1920), held that R. C. 2941.25 (A) did not mandate such an election by the prosecution. *Fluellen* further held that both counts may be submitted to the jury, and that the jury may find that the murder was both premeditated and committed during the commission of a crime, but that in such an event this section of law would limit the conviction to only one of such offenses. However the defendant argues that in *Fluellen* the jury had only convicted defendent on one murder count, and that here the jury had convicted upon both murder counts which, even though the trial court had set aside one of the murder convictions, resulted in prejudicial error as to this defendant-appellant.

This latter argument may be met by citing the decision of this court in the case of *State v. Miller*, unreported case number 75AP-1 (1975 Decisions, page 752), where the defendant had been convicted of two

counts of felony murder and two counts of first-degree murder where there had been homicides of two people, mother and child. The court there set aside one of the murder counts as it related to each homicide, and sentenced the defendant only on the one murder count.

Here the trial court also set aside one murder count and entered a judgment of conviction upon the other. Therefore, we hold that such conviction and sentence were in conformity with R. C. 2941.25, and that there had been no error committed by the trial court herein. This assignment of error is therefore dismissed.

Assignment of error number twelve basically argues that the trial court erred in improperly charging the jury. We note however that the record does not reflect that the defendant's counsel objected to the charge. Therefore, we could overrule such assignment of error purely upon the basis of Crim. R. 30, which rule requires that an objection be made to the charge of the court prior to assigning as error upon appeal that such charge was improper or inadequate. However, in reviewing the instructions on the law as given to the jury within the charge here, we find that there was no error committed by the trial court. This assignment of error is also dismissed.

Assignments of error numbers thirteen and fourteen are, respectively, that the verdict and judgment thereon are against the manifest weight of the evidence, and that such verdict and judgment are contrary to law.

A full and complete reading of the record, and all of the matters pertaining to the trial hereof, allows, if not dictates, this court's determination and holding that such verdict and judgment of the Common Pleas Court are not against the manifest weight of the evidence, and are not

contrary to law. Assignments of error numbers thirteen and fourteen, therefore, are dismissed.

Assignment of error number fifteen basically argues that the imposition of the death penalty pursuant to R. C. 2903.01, 2929.02, 2929.03 and 2929.04 is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, and that the death penalty constitutes cruel and unusual punishment in contravention to such provisions of the Constitution of the United States.

Each of the arguments posited by appellant as to the unconstitutionality of the Ohio death penalty statutes has been previously ruled upon by this court in upholding the death penalty and R. C. 2929.02, 2929.03, and 2929.04.

Based on *State v. Harris*, unreported case number 74AP-580 (1975 Decisions, page 1316), *State v. Royster*, unreported case number 75AP-195 (1975 Decisions, page 2075), and *State v. Hancock*, unreported case number 75AP-151 (1975 Decisions, page 2260), the appellant's fifteenth assignment of error is hereby dismissed.

The judgment of the Common Pleas Court of Franklin County, as entered upon the verdict of the jury finding this defendant guilty as charged, is therefore affirmed.

STRAUSBAUGH, P. J., and WHITESIDE, J., concur.

WHITESIDE, J., concurring.

Although I concur in the majority opinion and judgment, there are some additional observations that are pertinent.

The first three assignments of error are somewhat bothersome because of the implication inherent therein that a person is incapable of being a fair and impartial juror if he has read or heard anything at all concerning the particular case. In any situation where there has been a notorious crime, whether notorious in the community, in the state, or in the nation, it will be most difficult to find otherwise qualified jurors who have not read newspaper articles and listened to radio and television broadcasts concerning the crime.

If we are to exclude from the jury all who have read or heard anything concerning a notorious crime, we cannot have a cross-section jury, but would be relegated to having as jurors only those who are uninformed and uninterested as to what goes on in the world around them. Defendant correctly asserts that this can be solved, in this case, by a change of venue. But this contention presupposes that the informed and interested members of society are automatically disqualified for jury service in a notorious crime and are unable to be fair and impartial and to predicate judgments upon the evidence received in the courtroom without consideration of that which they may have read or heard prior to trial. I cannot hold the average person of our community, the general public, in such low esteem.

The average person is conscientious, dedicated, and intelligent and possesses a deep sense of justice, which comes to the fore especially during jury service. Such a person is not disqualified for jury service merely because he has heard or read something concerning the particular case. The voir dire of the jury indicated that those who had heard or read something concerning this case fell into the category of "average person" as defined above. There can be no error in proceeding with trial with such

a jury, nor can being tried to such a jury in any way prejudice defendant's rights. In this instance, the newspaper articles, although numerous, were in no way inflammatory and in no way attempted to incite the general public against the defendant. In this regard, the newspaper accounts in this case are totally unlike those in *Sheppard*, not only as to volume but also as to nature.

The fifth assignment of error raises the issue of sequestration of the jury. Defendant, through defense counsel, sought to have the jury sequestered during the trial. Sequestration of the jury is authorized, but not required, by R. C. 2945.31. Sequestration of the jury is in current vogue in many courts of this country during any notorious and lengthy trial. I cannot agree that such sequestration of the jury is either desirable or consistent with due process of law.

In this case, had the trial court granted the motion for sequestration, the jury would have been separated from their normal life and from their families and friends and forced to live together as a unit, rather than members of society performing a public duty, for some ten or eleven days. (The record indicates that the jury was sequestered during deliberations.)

The purpose of sequestration apparently is to isolate the jury from outside influences during the trial, especially that which they might read in the newspapers or hear on radio or television broadcasts concerning the trial itself. We substitute for this remotely possible, but largely imaginary, problem an enforced confinement of those selected to serve as jurors, forcing them to live together as a unit for the duration of the trial. Presumably, if the trial lasts long enough, the jury will commence to act as a unit, rather than the twelve separate individuals of which it

is composed. Thus, sequestration of the jury during the trial tends to eliminate one of the precepts upon which the jury system is founded, that is, trial by twelve members of society, each exercising his individual judgment and representing a cross-section of the community. It would appear that sequestration of the jury may raise a more serious question of whether the defendant has been deprived of trial by a fair and impartial jury than does permitting the jury to separate during trial. Any animosities or close personal friendships that develop from the enforced close association during the duration of the trial by sequestration may well tend to influence the jurors' final determination of the case even to a greater extent than any possible influence from the newspaper, radio, or television. Persons may well tend to go along with that which their friends think and to be opposed to that which those they don't like, or don't respect, think.

Be that as it may, the individual jurors themselves should be given some consideration. Jury service is a public duty, and every citizen should willingly serve when called upon. In return, it behooves society to make jury service as pleasant and as little burdensome as possible, rather than rendering it an ordeal or impossible for many. Obviously, if sequestration is ordered during the trial, there are some persons who might otherwise be able to serve as jurors, but who could not stay away from their families for such a prolonged period of time without serious consequences to the family relationship.

There appears to be no good reason why jury service in a notorious case necessarily must involve tearing the individual jurors away from their homes and their community and placing them, in effect, in jail for the duration of the trial. For that is what sequestration of the jury is; it is

confinement of the jury, although usually in more pleasant surroundings than the ordinary jail, for the duration of the trial in a direct and intentional effort to isolate the jury from all outside influences from the community, including contact with their family and friends, except under limited and controlled circumstances. This appears to me to be an unnecessary, almost valueless, ordeal. It borders upon cruel and unusual "punishment" meted out to innocent people, the jurors, for their willingness to perform a public duty in the public interest as part of our system of justice.

We do not require the judges, even if the judge be the trier of the facts, nor the lawyers, nor the witnesses to be sequestered during the trial; it is only the members of the jury who are deprived of living a normal life during the duration of the trial by sequestration. We indulge in a self-laudatory assumption that judges somehow are better able to resist the outside influences, such as newspaper, radio, and television publicity, than are the twelve members of the jury individually or collectively. As indicated above, from my experiences and observations, jurors are dedicated citizens. They make every effort to be fair and impartial. I know of no reason to believe that the members of the jury, after being instructed not to pay any attention to news accounts and to base their verdict solely upon the evidence presented to them in court, are any more apt to be influenced by outside influences than is a judge. Both are human, and both may be influenced by outside influences on occasion, but both make every effort not to let those matters which are improper to be considered have any influence upon their decision. What more can we ask of twelve citizens already taken from their daily routine to serve in a special capacity as jurors? Why should

we in addition subject them to confinement and the resultant separation from their home lives, from their families, and from their friends?

Sequestration of the jury during trial is a drastic step that should be taken only under the most extraordinary circumstances. Sequestration is of doubtful benefit to the defendant since the members of the jury may well resent being separated from their families and friends and act accordingly. Sequestration, on the other hand, is an unfair burden placed upon the jurors themselves, unless the circumstances are so extreme that no other course can possibly result in a fair and impartial trial. There is nothing in the record of this case justifying sequestration of the jury during the trial and, in my opinion, the trial court would have abused its discretion had it ordered sequestration of the jury.

Although I concur in the overruling of the eighth assignment of error, my reasons for doing so vary somewhat from those set forth in the majority opinion.

The testimony of witness Goins as to the statements made by alleged co-conspirator Weind is obviously hearsay. Even though hearsay, evidence is admissible of a statement of a co-conspirator made in furtherance of the objectives of the conspiracy as an exception to the hearsay rule of exclusion. However, the utilization of such exception to the hearsay rule must be approached with caution and sparingly exercised in order to avoid a violation of the defendant's right of confrontation and cross-examination of witnesses against him.

Goins' testimony related to whether or not Weind was involved in the murder. Goins' testimony as to Weind's statements was merely cumulative

to other evidence. On the other hand, Goins' testimony differed substantially in nature from that involved in *State v. Carver* (1972), 30 Ohio St. 2d 280, the second paragraph of the syllabus of which sets forth the general rule as to admissibility of extrajudicial statements of an alleged co-conspirator. In that case, the extrajudicial statement related solely to the issue of knowledge or intent, and not to the basic issue of involvement in the act.

A review of the record in this case, however, indicates that, even it if were error to admit Goins' testimony as to Weind's statements, such error was harmless error. There was other evidence of both Weind's and defendant's son's involvement in the murder itself. The basic issue herein was whether defendant hired them to commit the murder, and, of course, the evidence must be sufficient to permit a finding beyond a reasonable doubt, both as to defendant's hiring of the two to commit the murder and their committing the murder.

Even without Goins' testimony, there was ample evidence for a conviction. In fact, the key testimony in this case was that of defendant's daughter, Kay Osborne, without which there would have been insufficient evidence for a conviction. If the trier of the facts accepts the testimony of Kay Osborne, as the jury did in this case, there could be no doubt whatsoever of defendant's guilt. Portions of Kay Osborne's testimony were substantiated by other witnesses; however, it is necessary to accept her testimony in order to make a finding of guilt.

Although there may be some doubt as to the admissibility of Goins' testimony as to Weind's statements before the murder, and even greater doubt

as to the admissibility of Goins' testimony as to Weind's statements after the murder, any error in the admission of Goins' testimony is not prejudicial in light of the totality of the evidence and especially that of Kay Osborne, which the jury had to believe in order to make a finding of guilt.

With the above additional observations and qualifications, I concur in the majority opinion and in the judgment overruling the assignments of error and affirming the judgment of the trial court.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19.76 TERM

To wit: December 30, 1976

State of Ohio,
Appellee,

vs.

Alberta L. Osborne,
Appellant.

No. 76-791

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of FRANKLIN, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the execution date be set for Wednesday, March 2, 1977.

THOMAS STARTZMAN,
Clerk

..... *19*.....

.....

_____ *Deputy*

RECORD OF COSTS

Docket Fee . . . . . *$*.....*Paid by* Affidavit of Poverty

Docket Fee . . . . . *$*.....*Paid by*.....

Docket Fee . . . . . *$*.....*Paid by*.....

Printing Record . . . . . *$*.....*Paid by*.....

Supplemental Record . . *$*.....*Paid by*.....

Sheriff's Costs . . . . . *$*.....*Paid by*.....

Sheriff's Costs . . . . . *$*.....*Paid by*.....

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 75AP-327
Alberta Osborne,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on May 11, 1976, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Franklin County, Ohio, is affirmed.

STRAUSBAUGH, P.J., HOLMES and WHITESIDE, JJ.

By _____
Judge Robert B. Holmes

cc: Alan C. Travis
James K. Hunter, III

MAY 12 1976
THOMAS J. ...
CLERK
COURT OF APPEALS
FRANKLIN COUNTY, OHIO
FILED